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Supreme Ct.
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No. 05-

IN THE

# Supreme Court of the United States

JOHN DOE,

*Petitioner,*

v.

FREDERICK MENEFEE, Warden of the Otisville Federal Correctional Institution; THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. POLLOK
*Attorney for Petitioner*
260 Madison Avenue-22nd Floor
New York, New York 10016
(212) 679-2900

196072

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred when it failed to disqualify itself, pursuant to 28 U.S.C. § 455(a), from consideration of the petitioner's appeal even though the Second Circuit's Director of Legal Affairs is the former prosecutor who obtained the petitioner's conviction by a plea which the district court found to be coerced.

2. Whether the United States Court of Appeals for the Second Circuit erred when it found the district court's factual findings of petitioner's actual innocence and reasonable diligence "clearly erroneous" despite the unimpeached hearing testimony of the alleged complainant who denied he informed the prosecutor, now the Second Circuit's Director of Legal Affairs, that the petitioner had committed any crime against him.

3. Whether the Antiterrorism and Effective Death Penalty Act's ("AEDPA") one year period of limitation, codified at 28 U.S.C. § 2244(d)(1) is unconstitutional because it lacks an actual innocence savings clause similar to 28 U.S.C. §§ 2244(b)(2)(B)(ii) & 2255 and if § 2244(d)(1) is constitutional, should the limitation period be equitably tolled in this case.

4. Whether the abandonment and deceit of a retained attorney and the petitioner's inability to proceed *pro se* is an extraordinary circumstance warranting equitable tolling of 28 U.S.C. §§ 2244(d)(1) and 2244(d)(1)(A).

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following parties appear here and appeared before the United States Court of Appeals for the Second Circuit. The petitioner here and appellant below is "John Doe" and the respondents here and appellees below are Frederick Menefee, Warden of the Otisville Federal Correctional Institution and the Attorney General of the State of New York represented by the Westchester County District Attorney.[1]

[1] The district court granted permission to the petitioner to proceed using the pseudonym "John Doe". Neither the Federal Bureau of Prisons on behalf of Warden Frederick Menefee, nor Mr. Menefee personally, filed any briefs or motions in this case.

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## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit ("court of appeals") are reported at 49 Fed. Appx. 340 (Summary Order, Oct. 22, 2002), and 391 F.3d 147 (November 19, 2004) and are reprinted in the Appendix to the Petition ("Pet. App.") at 123a and 1a, respectively. A petition for re-hearing *en banc* was denied by the court of appeals on June 9, 2005 and that order is reprinted herein at Pet. App. 148a. The opinions rendered by the United States District Court for the Southern District of New York ("district court") are not reported and are reprinted herein at Pet. App. 96a, 128a and 140a.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 19, 2004. Pet. App. 1a. A petition for rehearing *en banc* was denied on June 9, 2005. Pet. App. 148a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Title 28, United States Code §§ 2244(d)(1), 2244(b)(2)(B), 2254 and 455. United States Constitution, Article I, Section 9, Clause 2, United States Constitution, Amendments V, VI, VIII, and XIV.

## STATEMENT OF THE CASE

This case poses questions similar to issues regarding actual innocence in habeas corpus proceedings raised in *House v. Bell*, __ U.S. __, 125 S. Ct. 2991, 73 USLW 3753 (June 28, 2005) (No. 04-8990), which was recently granted certiorari review. The petitioner joins the arguments made by the petitioner in *House* on the disparity in the application of the actual innocence standard of *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995) ("*Schlup*") throughout the circuits.

Unlike *House*, however, the petitioner here successfully proved his actual innocence to the district court under *Schlup*.

In an irregular action, the court of appeals reversed the district court's findings of fact and credibility determinations as clearly erroneous. This highly unusual reversal of a district court's credibility determinations, based upon live witness testimony, and made after a three day hearing, is an improper application of clear error precedent and Fed. R. Civ. P. 52.

The majority's misapplication of the clear error standard was compounded by an appearance of partiality under 28 U.S.C. § 455(a) because the primary witness for the respondent who testified at the habeas hearing was former prosecutor Elizabeth Cronin, who is and was at the time of the hearing, the court of appeal's Director of Legal Affairs. Ms. Cronin's testimony was discredited by the district court. Pet. App. 88a.

The petitioner seeks reinstatement of the district court's findings of fact including petitioner's actual innocence and due diligence. The petitioner further seeks equitable tolling of the limitations period specified in 28 U.S.C. § 2244(d)(1) because he successfully met or exceeded the actual innocence requirements articulated in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995), *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998), and *Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639 (1986).

Alternatively, the petitioner argues that § 2244(d)(1)'s one year limitation period is unconstitutional as a violation of due process, equal protection, the ban against cruel and unusual punishment, and an illegal suspension of the writ of habeas corpus. In addition to actual innocence and reasonable diligence, the petitioner argues that the abandonment by his former attorney, combined with his inaccessibility to state legal materials in federal prison are extraordinary circumstances calling for equitable tolling of § 2244(d)(1).

**Factual Background**

Beginning in September 1993, the petitioner cooperated with a joint state and federal task force investigating the child pornography industry. However, before the petitioner and his attorney participated in the cooperation, the Westchester County District Attorney's Office assured the petitioner that if he fully cooperated in the broader federal investigation, he would not be prosecuted by the Westchester County District Attorney's Office based upon information discussed during the proffer sessions. The petitioner participated in multiple proffer sessions with law enforcement agents representing the Southern District of New York, the District of New Jersey, and Westchester County.

By October 1994, it became apparent that the United States Attorney for the District of New Jersey would require the petitioner's testimony at a trial. At the same time, Assistant District Attorney ("A.D.A.") Elizabeth Cronin of the Westchester County District Attorney's Office contacted the petitioner's attorney and stated that it was her intention to prosecute the petitioner for sodomy with a minor.

Because Ms. Cronin was not the A.D.A. originally assigned to the petitioner's case when the cooperation began, the petitioner's attorney, Murray Richman, explained to Ms. Cronin that as part of the petitioner's 1993 cooperation agreement, he was to be exempt from such prosecution in Westchester County. The original A.D.A. who entered into the non-prosecution agreement was no longer with the office and Ms. Cronin denied that such a non-prosecution agreement existed. During this time period in late 1994 and early 1995, A.D.A. Cronin made several false representations and misleading statements to the petitioner to induce him into pleading guilty to a crime he did not commit.

First, A.D.A. Cronin asserted that the petitioner sodomized the complainant on unspecified dates in Tarrytown, New York sometime between July 1, 1993 and July 31, 1993 when the

complainant was twelve years old. Yet in an affidavit, and later at a federal habeas corpus hearing, the alleged complainant asserted that no sexual contact ever occurred between himself and the petitioner. Instead the complainant testified that in 1994 he informed Ms. Cronin and her investigator, during an interview, that no sexual contact had occurred.

Second, prior to the petitioner pleading guilty, A.D.A. Cronin contended that she possessed a written statement from the complainant stating that the petitioner had violently and sexually assaulted the complainant during the aforementioned time period. After the petitioner pled guilty, however, and before sentencing, petitioner's attorney asked to see the written statement. Ms. Cronin could not produce a signed statement and instead allowed the attorney to see her handwritten and partially undated notes. In reality, no written statement existed, nor videotape or sound recording or transcript made of the interview with the complainant.

Third, A.D.A. Cronin asserted that the purported complainant had alleged that the petitioner forcibly sodomized him on two occasions, meriting two counts of Sodomy in the First Degree, a class "B" felony, which mandated prison time. The pressure on the petitioner was increased when the AUSA who was prosecuting the federal case in which the petitioner testified as a cooperator, told the petitioner that she would be very displeased if the petitioner did not plead guilty to the state offense.

Based upon A.D.A. Cronin's misrepresentations of the nature and substance of the complainant's statement, the petitioner pled guilty to a lesser charge of consensual sex with a minor on February 6, 1995 with a promised sentence of probation. He was also promised that if he successfully cooperated in the federal case, the AUSA would write a letter to the state judge requesting a lesser sentence.

The misrepresentations by Ms. Cronin were material because they directly involved issues related to the petitioner's guilt or innocence and there is a reasonable probability that the outcome of the proceedings might have been different had the information been disclosed prior to plea. The petitioner was unable to make a knowing and voluntary decision to plead guilty because the prosecutor misrepresented the facts of the case and threatened that, if the petitioner did not plead guilty, she would prosecute him for forcible sodomy and thereby he would lose his promised letter to the judge from the AUSA and he could be sentenced to a substantial prison term.

The district court found these circumstances coercive. Pet. App. 115a. Indeed, the petitioner was required to plead guilty the day before he was scheduled to testify in the federal case in New Jersey. After he completed his cooperation by testifying at a trial and the AUSA wrote a favorable letter to the county court judge, on January 16, 1996, the petitioner was sentenced to the promised five years probation and an order of protection was entered prohibiting communication with the complainant.

In May 1998 the complainant telephoned the petitioner. The petitioner quickly ended the conversation after explaining that an order of protection was in effect barring any communication between them. Based upon that brief telephone call in 1998, the petitioner began to question the factual soundness of the evidence leading to his 1996 conviction but he was not permitted to locate and talk to the complainant to inquire further.

On August 19, 1998, the petitioner exhausted his direct appeals from his 1996 conviction and the one year period of 28 U.S.C. § 2244(d)(1) began to run.

On November 14, 1998, the petitioner was arrested and incarcerated on an unrelated federal conspiracy case. The petitioner requested that his previous attorney, Murray

Richman, file a state post-conviction motion to seek reversal of the state 1996 conviction because he was actually innocent and that conviction would enhance the sentence of his federal conviction. Murray Richman, declined to file the state post-conviction motion because he was a material witness to certain statements of former prosecutor Elizabeth Cronin.

**The State Post-Conviction Motion**

On or about March 2, 1999, the petitioner retained attorney Patrick Wall to investigate and file a state post-conviction motion pursuant to New York Criminal Procedure Law § 440. At the time, the petitioner was incarcerated at the federal Metropolitan Detention Center in Brooklyn ("MDC").

On April 9, 1999 the petitioner pled guilty in federal court to the unrelated charge of conspiracy to receive child pornography. The petitioner pressed attorney Wall to file a state post-conviction motion well before his sentencing in the federal case.

On or about May 10, 1999, attorney Wall met with the petitioner at the MDC and assured the petitioner that he was aware of the limitations period imposed for federal habeas relief, and he would file the motion in time to meet the deadline. Pet. App. 118a.

On November 12, 1999 the petitioner received the federal pre-sentence report and attorney Wall again promised to file the state § 440 motion within days.

On November 18, 1999, the one year (including the 90 day period to seek certiorari under 28 U.S.C. § 2244(d)(1)(A)) limitation period expired without the state motion being filed.

On December 12, 1999, the petitioner telephoned Wall who demanded and was paid more money by the petitioner even though the time limitation had expired in November 1999. Once he received additional money, Wall advised the petitioner that there was no problem with the deadline even though Wall knew

that the limitation period of § 2244(d)(1) had expired. As the federal sentencing date approached, the petitioner became increasingly concerned that the state conviction would enhance his federal sentence.

In January 2000, the petitioner's brother learned that Wall was hospitalized and suffering from heart and alcohol related illnesses. The petitioner immediately sought new counsel to pursue his state post-conviction motion. The petitioner could not file the state claim *pro se* because the federal prison library in the MDC had no resources pertaining to New York state laws and procedures.

In February through May 2000, petitioner retained new counsel. The complaining witness was located and he signed an affidavit in April 2000. The state motion was filed in the county court on May 10, 2000. On May 12, 2000, Doe was sentenced to five years imprisonment in the federal case.

On February 16, 2001, the county court granted the petitioner a hearing on his motion to set aside his state conviction. Pet. App. 147a. However, after the publication of a local newspaper article about this case (Pet. App.130a, n.3, 150a) the county court abruptly reversed itself and denied the motion without a hearing. The petitioner immediately sought leave to appeal to the appellate division but that leave was denied on November 19, 2001.

**The District Court's Finding Of Actual Innocence**

On November 30, 2001 the petitioner filed a § 2254 petition in the district court. Initially the § 2254 petition was summarily dismissed by the district court as untimely because petitioner had not filed his state post-conviction motion within the time limitation of § 2244(d)(1). Pet. App. 139a.

The district court granted a certificate of appealability and the petitioner appealed the summary dismissal to the court of appeals which remanded the case to the district court for a fact

finding hearing to determine, under *Schlup*, whether the petitioner was actually innocent and reasonably diligent in pursuing his claims. Pet. App.123a.

After a three day hearing on remand, and listening to the testimony of a number of witnesses, the district court found that the petitioner was actually innocent of the 1996 state crime and reasonably diligent in pursuing his claim. The district court further found that the petitioner's plea had been coerced. Pet. App. 119a.

Nevertheless the district court declined to equitably toll the one year limitations period of 28 U.S.C. § 2244(d)(1) citing an infringement on federalism. Pet. App. 121a. *See Lucidore v. New York State Div. of Parole*, 209 F.3d 107 (2d Cir.), *cert. denied*, 531 U.S. 873, 121 S. Ct. 175 (2000).

The district court also rejected the petitioner's argument that the limitation period should be equitably tolled because his retained attorney abandoned him while he was incarcerated and he could not pursue his claims *pro se* due to an absence of state law materials in the federal prison library. Pet. App. 119a.

Because the district court declined to equitably toll the limitation period of section 2244(d)(1), the district court never reached the merits of the petitioner's underlying constitutional claims (*Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993)), including the withholding of exculpatory material by the prosecutor, ineffective assistance of counsel, prosecutorial misconduct, and coercion at plea.

The district court granted a second certificate of appealability and the petitioner appealed the district court's legal conclusions pertaining to equitable tolling.

**The Second Circuit's Conflict Of Interest**

While the petitioner's appeal was pending, the court of appeals, *sua sponte* and without notice to the parties, formed an

"Ad Hoc Committee" to determine if it should disqualify itself from this case because the Second Circuit's Director of Legal Affairs, Elizabeth Cronin, was directly involved in the case. Pet. App. 84a, n.4. That committee determined that the conflict was not severe enough to warrant disqualification. Pet. App. 84a, n.4.

In another unusual move, in an order dated April 22, 2004 (Pet. App. 94a), the court of appeals, *sua sponte*, requested argument from the parties on whether the petitioner's permission to use the pseudonym "John Doe" should be rescinded. After written submissions were made by the parties, the court of appeals allowed continued use of the pseudonym.

In the court of appeals' second decision in this case, the majority of the panel set aside the district court's findings of fact as clearly erroneous. Pet. App. 1a. This rejection of the district court's findings of fact was made even though the respondent failed to cross-appeal those factual findings. The dissent criticized the majority for overruling the district court's credibility determinations and argued that the majority failed to meet the clearly erroneous standard of review. Pet. App. 71a-72a.

**Petition For Certiorari**

It is argued in this petition that the court of appeals acting under an appearance of partiality, exceeded its authority under Fed. R. Civ. P. 52 and Supreme Court precedent when it found the district court's credibility determinations clearly erroneous.

The petitioner also challenges the constitutionality of 28 U.S.C. § 2244(d)(1) under due process, equal protection as applied to Congress under the Fifth and Fourteenth Amendments, the Eighth Amendment, and the Suspension Clause. Section 2244(d)(1) is unconstitutional because it conflicts with the actual innocence "savings clauses" under 28 U.S.C. §§ 2244(b)(2)(B)(ii) and 2255 which permit successive habeas petitions *at any time* if a petitioner can demonstrate his actual innocence. *See* Pet. App. 121a, n.8. It is

respectfully submitted that Congress cannot enact a statutory actual innocence savings clause for successive petitioners but not for initial petitioners who are similarly situated.

The petitioner alternatively seeks equitable tolling on the grounds of attorney abandonment and inaccessibility to state legal materials in a federal prison.

## REASONS FOR GRANTING THE PETITION

### I. THE SECOND CIRCUIT CREATED AN APPEARANCE OF PARTIALITY BY FAILING TO DISQUALIFY ITSELF FROM THIS CASE REQUIRING AN EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWER.

The court of appeals erred when it failed to disqualify itself. The prosecutor who convicted the defendant in 1996 is that court's Director of Legal Affairs. Ms. Cronin and her staff work closely with the judges of the court of appeals and she has undoubtedly formed personal relationships with the judges and staff. Clearly, a factual finding that the Director of Legal Affairs deliberately and unlawfully obtained a conviction could damage the reputation of the court of appeals.

Title 28 U.S.C. § 455(a) requires judges to disqualify themselves when their impartiality might reasonably be questioned. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859, 108 S. Ct. 2194 (1988). The mere appearance of impartiality requires disqualification if a reasonable person, with knowledge of the circumstances, would question the impartiality of the judges. A judge who concludes that his impartiality might reasonably be questioned, should act to disqualify himself to avoid any appearance of partiality. *Id.* at 860; *see Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983); *Liteky v. United States*, 510 U.S. 540, 548, 114 S. Ct. 1147 (1994).

Here, a reasonable person, knowing the circumstances of this case, would agree that the court of appeals should have disqualified itself. Therefore, unless this court overrules the court of appeal's decision on other grounds, this case should be remanded and assigned to a randomly selected judicial panel drawn from the other Circuit Courts of Appeals to review the findings of the district court.

## II. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY WHEN IT FOUND THE DISTRICT COURT'S CREDIBILITY DETERMINATIONS CLEARLY ERRONEOUS.

Rule 52 of the Federal Rules of Civil Procedure provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Here, the district court listened to the testimony of live witnesses over the course of three days and considered both admissible and inadmissible evidence in reaching its conclusion that the petitioner was actually innocent, reasonably diligent and his plea coerced.

### A. *Respondent's Failure to Cross-Appeal*

The respondent did not cross-appeal the district court's findings of fact. *See* Fed. R. App. P. 4(a)(3). "It is well-recognized that an appellee who has failed to file a cross-appeal cannot 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Montgomery v. City of Ardmore*, 365 F.3d 926 (10th Cir. 2004) (quoting *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 145 (2d Cir. 1997); (*Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191, 57 S. Ct. 325 (1937); *see Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994); *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); *Pierre v. Rivkind*, 825 F.2d 1501, 1506 n.3 (11th Cir. 1987); *Spurlock v. F.B.I.*, 69 F.3d 1010, 1018 (9th Cir. 1995);

*MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472 (5th Cir. 2003), *cert. denied*, 514 U.S. 1072, 124 S. Ct. 2413, (2004); *Cochran v. M & M Trans. Co.*, 110 F.2d 519 (1st Cir. 1940). Indeed, in the court of appeals for the Second Circuit, unlike some circuits, failure to cross-appeal has been held to be a jurisdictional bar to consideration of modification of the lower court's findings. *See Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Assocs., Inc.*, 806 F.2d 14 (2d Cir. 1986). The district court's findings of fact should stand.

**B. *The District Court Did Not Commit Clear Error***

In *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504 (1985), the Supreme Court set forth the restrictions to be met before a court of appeals may find a district court's factual conclusions clearly erroneous:

> If the district court's account of the evidence is *plausible in light of the record viewed in its entirety, the court of appeals may not reverse* it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

*Anderson*, 470 U.S. at 573-74, 105 S. Ct. 1504 (citations omitted) (emphasis added). The reversal of the district court's findings of fact in this case is particularly egregious because the *court of appeals* remanded this case for the very purpose of allowing the district court to develop a factual record but, showed no deference to those factual findings. Pet. App. 126a. Rather, the majority made its own factual conclusions even though the Supreme Court has held:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only

> the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

*Id.*, 470 U.S. at 575, 105 S. Ct. 1504 (emphasis added, citations omitted). There was simply no basis for the majority to second-guess the district court because the statements of the supposed complainant and the petitioner "were plausible in light of the record viewed in its entirety" (*Id.*, 470 U.S. at 473) and where, as here "there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly erroneous." *Id.* 470 U.S., at 574 (emphasis added); *Robinson v. Lehman*, 771 F.2d 772 (3d Cir. 1985); *Salve Regina College v. Russell*, 499 U.S. 225, 233, 111 S. Ct. 1217 (1991).

Nor can it be argued, after reviewing all of the evidence presented to the district court, that a reviewing court is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525 (1948). The determination here was based upon the credibility of live witnesses and it was impossible for the majority to have a *definite and firm* conviction that one or more witnesses were being untruthful when they never heard or saw the testimony. The word "definite" means "indisputable." It defies reason for the majority below to find that the testimony of the respondent's witnesses were indisputable because there were two plausible and permissible views of the evidence and therefore the factfinder's choice between them *cannot* be clearly erroneous. *United States v. Sash*, 396 F.3d 515 (2d Cir. 2005). *See United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 179 (1949); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 102 S. Ct. 2182 (1982).

Even assuming, *arguendo,* that the district court's findings of fact were imprecise, the Supreme Court has held that lack of precision in identifying evidence that supported its findings is no excuse for an appellate court to ignore the dictates of

Rule 52(a) and engage in impermissible appellate fact finding where, as here, there are two plausible and permissible views of the evidence:

> We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, *supra*, 470 U.S., at 573-574, 105 S. Ct., at 1511 . . . Indeed, the Court of Appeals even noted the conflict in the testimony before the District Court, *see* 816 F.2d at 1507, n. 9, and its failure to defer to the District Court's findings in light of this recognition is difficult to fathom.

*Amadeo v. Zant*, 486 U.S. 214, 223, 108 S. Ct. 1771 (1988).

Rather than properly accept the district court's permissible credibility determinations, the majority focused on inadmissible hearsay including Ms. Cronin's notes and unverified transcripts of tape recorded conversations (the actual tapes were never produced by the respondent). Under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) and *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998), the unverified transcripts of hearsay statements, which never directly implicate the petitioner in misconduct, should never have been considered by the district court or the court of appeals because the transcripts are totally inadmissible and a reasonable jury would never have been able to consider them.

The majority also misconstrued the content of the hearsay transcripts. For example, the majority claimed that a tape recording existed that overheard Doe discussing the complainant in a sexually explicit manner. *Doe*, 391 F.3d at

151. No such tape or transcript was offered to the district court as evidence. Pet. App. 87a. Even the respondent alleged in its papers that *another* individual was overheard discussing the complainant in a sexual manner and never claimed at the hearing that it was Doe.

The court of appeals misstated as fact that Doe had a previous sex offense in Maine. The petitioner was convicted of simple assault –not a sexual offense– in Maine in the 1970's.

Other errors in the majority's findings of fact include that it somehow knew that the alleged sexual misconduct in this case occurred on August 13, 1993 yet not even the prosecutor (who is now the Director of Legal Affairs) alleged a date certain. This date is completely derived from conjecture and has no basis in the record particularly since the original state charging instrument alleged that the sexual contact occurred between July 1 and July 31, 1993 and it was not until the day of the plea, when the prosecutor discovered that the petitioner was on tour in England for most of that period, that the plea allocution was modified to extend into August 1993. As the dissent indicated, this wavering timeline is suspicious. Pet. App. 88a.

The majority also erroneously stated as fact that the complainant stated in his affidavit that he attended two meetings at the Westchester County District Attorney's office. The affidavit simply did not make that assertion. The majority was wrong when it asserted that the district court "failed to consider investigator Storino's testimony that [the complainant] told Doe that he would not give the authorities any incriminating information about Doe, which suggests that the relationship between [the complainant] and Doe was less than innocent." In fact, on page 310 of the hearing transcript, Storino testified that he had been advised by Doe's FBI handler, Special Agent James Kyle, that a conversation took place between an individual named O'Rourke and Doe and *not* between the complainant and Doe and there is no evidence that the complainant even knew about this conversation.

The majority pointed to Doe's guilty plea and a statement he made in one of many proffer sessions in an attempt to discredit his testimony. The district court found, however, that the petitioner was coerced under the totality of the circumstances and did not have confidence in the outcome of the state proceedings given the pressure being applied to the petitioner to plead guilty. It is well settled that a person, faced with evidence of his guilt, may admit guilt even if he is actually innocent to avoid the possibility of an increased penalty. *See North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160 (1970). Pet. App. 85a.

Here, the petitioner admitted to the facts as read by Ms. Cronin at his plea; however, unknown to the petitioner, the complainant never made the allegations. Contrary to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), the prosecutor suppressed the exculpatory statements of the complainant to secure a plea. None of the allegations made by Ms. Cronin were true but the petitioner was faced with either an admission to something he had not done and a sentence of probation or a trial wherein he was told that the complainant would claim that the petitioner violently and sexually attacked him. Because it was no secret that the complainant had been to petitioner's home, the petitioner believed that he was vulnerable to such an allegation. If the petitioner had been convicted of two alleged violent sexual attacks on a minor after trial, the petitioner could have been imprisoned for up to 50 years if sentenced consecutively. New York Penal Law § 70.00(2)(b).

Yet, without the purported statement of the complainant, the prosecutor had no case. There was no corroboration nor physical evidence. There was no tape recording, transcript or videotape of the complainant's interview. The notes upon which the prosecutor relied to refresh her recollection during the hearing were partially undated and contradicted by the testimony of two other witnesses for the respondent: first, the testimony of A.D.A. Bernhard indicated that there was only one assault reported by the complainant while Ms. Cronin's testimony and

notes stated that two assaults took place; and second, the testimony of investigator Storino indicated that he drove the complainant to one interview and not two interviews as claimed by Ms. Cronin and her partially undated notes. Ms. Cronin also misled the petitioner's attorneys into believing that she definitely had a signed statement from the complainant. As the prior attorney for the petitioner testified, this turned out to be untrue. Pet. App. 84a.

The type of coercion and manipulation of evidence experienced by the petitioner was found to be a violation of due process in *Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964 (1942). "The agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *See Brady v. United States*, 397 U.S. 742, 750, 90 S. Ct. 1463 (1970). Here, by falsifying the alleged statements of the complainant, the prosecutor deprived the petitioner of his constitutional right to "rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Id.*, 397 U.S. at 750-51.

It is also patently unbelievable that the complainant, after supposedly being violently and sexually attacked by the petitioner on one occasion would have returned to the same house and allow himself to be attacked again. Pet. App. 78a-79a. It is also undisputed that while the petitioner was cooperating, his FBI handler knowingly allowed the petitioner to go to an amusement park with the complainant four months *after* these supposed allegations were made. It is extremely implausible that an FBI agent handling a cooperating witness would have permitted this unsupervised contact had the complainant truly made claims of sexual assault. Pet. App. 87a.

The majority simply sidestepped the issue that the district court found Ms. Cronin not credible. Pet. App. 88a. The majority attacked Doe's testimony as self-serving but ignored the motives

of Ms. Cronin. As the dissent recognized, if the facts are truly as the district court found, Ms. Cronin misled the petitioner and his attorney to induce a plea, lied about the strength of her case, lied about the existence of a signed statement by the complainant, lied about the exculpatory statements of the complainant, and coerced the petitioner into pleading guilty. "[B]ecause [Cronin's] testimony could likewise be viewed as self-serving, it is not for this Court to decide which testimony is more believable on this basis." Pet. App. 89a. This is why the Supreme Court has held that where there are two plausible and permissible versions of the evidence, the district court's finding must control. *Anderson, supra*.

### C. *The Petitioner Demonstrated His Actual Innocence*

The petitioner successfully demonstrated "that, in light of all the evidence, it was more likely than not that no reasonable juror would have convicted him" (*Bousley v. United States*, 523 U.S. 614, 620-21, 118 S. Ct. 1604 (1998)) and to sustain the conviction would be a miscarriage of justice (*Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639 (1986)).

The district court correctly applied the standard for a finding of actual innocence and reasonable diligence as set forth in *Schlup* and *Bousley*. The petitioner supported his claim of actual innocence "with new reliable evidence—whether exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence— that was not presented at trial." *Schlup*, 513 U.S. at 324. The respondent, on the other hand, could not produce any evidence, other than the contradictory statements of the two prosecutors (who merely repeated hearsay) and one investigator to refute a finding of actual innocence.

The petitioner's free standing constitutional claims of ineffective assistance of counsel, unconstitutional coercion and prosecutorial misconduct should have been considered under *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993). The district court did not credit the testimony of Ms. Cronin because

it was clearly less reliable than the complainant's testimony which was based upon direct knowledge of the events. The plausible and permissible view of the evidence allowed the district court to find "that it is more likely than not that no reasonable juror would have found [the petitioner] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, *Bousley*, 523 U.S. at 623.

After considering the testimony and other evidence, the district court found "that where [the complainant's] testimony differs [from Cronin's] as to material facts, his version is entitled to greater weight." Pet. App. 108a. The district court also found that given the totality of the record, the petitioner's testimony had "the ring of truth" and was in fact "truthful". Pet. App. 116a.

Contrary to the majority's findings of fact, the existence of two meetings with Cronin and Bernhard was flatly refuted by the complainant in both his affidavit and testimony. Cronin's and Bernhard's testimony also differed in that Bernhard recalled that only one assault on the complainant occurred while Cronin maintained that two attacks occurred. When asked about his interview at the District Attorney's office the complainant testified that

> They took me in a room and they started asking me questions about Mr. [Doe]. And I answered them the best that I can. And, you know, like asking me like has he ever touched me, ever put his hand on me and all of that. And I told them no. That never happened. If it would have happened, I would have told my parents. I would have told somebody. I could have done something about it.

Hearing Transcript at 13. The majority below apparently did not ascribe any weight to the fact that the complainant came forward and contacted the petitioner of his own volition when he learned of petitioner's conviction and had no motive to lie. The only motive the majority offered was ambiguous and

unsubstantiated speculation. There is nothing in the record to support the majority's conjecture that the complainant was embarrassed or ashamed to know the petitioner. The respondent clearly could have crossed-examined on this issue but did not. The respondent endeavored, but failed to shake the complainant's credibility by claiming that he was homophobic (the complainant testified that his own brother is gay and he was not homophobic) and that he had animus towards the criminal justice system. The district court judge, who heard and saw the witness testify, rejected these attacks.

The majority also did not consider that if this case had gone to trial, no reasonable jury could have convicted the petitioner without the testimony of the alleged complainant. Under New York law, a jury is not permitted to convict a defendant based solely upon his own statement. New York Criminal Procedure Law § 60.50 provides that "[a] person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed." Without the statement of the complainant there was simply no case. There was no evidence (police reports, medical evidence, forensic evidence, probation interview of the alleged complainant or other witnesses) that the petitioner had sexual relations with the complainant. Had the petitioner known that the complainant, with his mother present, told Ms. Cronin that no crime had been perpetrated, the petitioner or any reasonable person would have proceeded to trial. There is also no question that given all of the circumstances surrounding his cooperation, the petitioner was coerced into pleading guilty the day before he was scheduled to testify in the unrelated federal case. It was made clear to him by the AUSA in New Jersey that he would be useless to her if he had to invoke his Fifth Amendment rights during his testimony and a plea in the state court was the only way to avoid this. Without a letter from the AUSA praising the petitioner for his cooperation, the county court could have sentenced the petitioner to up to seven years

in prison based upon his plea. New York Penal Law § 70.00(2)(d).

With respect to due diligence, the district court found that the petitioner, who was incarcerated during the period his state post-conviction motion was due, hired an attorney and acted diligently to pursue his claim of actual innocence. The district court found, however, that the petitioner could not have pursued his actual innocence claim until he was able to secure an affidavit from the complainant in April 2000. This is correct because New York Criminal Procedure Law § 440.30[4][b] requires sworn statements in support of a post-conviction motion.[1] As the district court explained:

> Until April 2000 when [the petitioner's new attorney] located [the complainant] for the first time since his conviction, and obtained his affidavit, Doe had nothing to go on except his own protestations. In his mistaken belief, the prosecutor had a written statement from [the complainant] inculpating him. On May 10, 2000, after the problem with [his previous attorney] was solved, Doe's Section 440 motion was filed in state court. All agree the motion had to be filed to effect exhaustion of state remedies, before any federal writ could be sought... Once it became clear that he was going to be sentenced in the Eastern District, and that his Westchester conviction would enhance his Sentencing Guidelines, Petitioner did become diligent. He discharged Attorney W and hired another attorney who did proceed thereafter with reasonable diligence in processing the Section 440 Motion to no avail. After the statute of limitations under AEDPA had expired,

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[1] 440.30[4][b] provides that a court may summarily deny post-conviction relief if the "motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one."

> Doe did exercise reasonable diligence in pursuing his actual innocence claim. Between the date of his conviction and his arrest in the Eastern District, the matter was of little concern, and, in any event, there was nothing he could do about it without [the complainant]. I conclude that, based upon the totality of the unusual circumstances in this case, Doe did exercise reasonable diligence in pursuing his actual innocence claim once he became able to pursue it at all.

Pet. App. 119a. *See Wilkerson v. Cain*, 233 F.3d 886, 889 (5th Cir. 2000).

The petitioner reasonably relied on his previous attorney to timely file his state post-conviction motion but the attorney abandoned him after he was paid. When the petitioner discovered that his attorney was suffering from alcoholism, hospitalized for related illnesses, and had never filed the state motion, the petitioner immediately sought new counsel who filed the state post-conviction motion after obtaining an affidavit from the complainant. The majority below did not even consider the testimony of the petitioner's brother who testified at the hearing and witnessed how Doe's previous attorney misled and abandoned him. The district court stated "I think it's implicit in this court's prior ruling that Wall was somewhat of a faker and an alcoholic and negligent." Hearing Tr. 136. Doe did not discover this fact until it was too late and the limitation period of 2244(d)(1) had elapsed.

## III. TITLE 28 U.S.C. §§ 2244(d)(1) IS UNCONSTITUTIONAL BECAUSE A HABEAS PETITIONER MAY RAISE ACTUAL INNOCENCE AS A GROUND TO TOLL AEDPA'S PERIOD OF LIMITATION IN A SUCCESSIVE § 2254 or § 2255 APPLICATION BUT NOT IN AN INITIAL § 2254 PETITION. THIS IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Title 28 U.S.C. § 2244(d)(1), the statute governing the limitation period for filing a habeas petition under § 2254 is unconstitutional because it violates due process, equal protection, the prohibition against unreasonable suspension of the writ of habeas corpus, and the bar against cruel and unusual punishment. The Equal Protection Clause of the Fourteenth Amendment as applied to Congress through the Due Process Clause of the Fifth Amendment, commands that Congress shall not "deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S. Ct. 3249 (1985).

Without an actual innocence "savings" exception for all potential 2254 petitioners, the statute is discriminatory and has led to a confusing and inconsistent array of court made laws to toll the limitations period in certain cases but not others. AEDPA's limitation period should be overturned. As the Sixth Circuit observed in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005)[2]:

> Following *Schlup*, Congress codified an actual innocence exception to the procedural bar on successive

[2] While the petitioner's application for rehearing en banc was pending, the Sixth Circuit decided Souter and the petitioner moved pursuant to Fed. R. App. P. 28(j) to cite the case in support of petitioner's arguments on the unconstitutionality of § 2244(d)(1). The absence of an avenue for relief was also raised in the initial petition. Pet. App. 134a, 137a-138a, 141a, and in petitioners brief in the Second Circuit at p. 28.

> habeas petitions in AEDPA, but did not include an exception with regards to the new limitations provisions. 28 U.S.C. § 2244(b)(2)(B)(ii). Neither the Supreme Court nor this court has specifically addressed the issue of whether an actual innocence exception to the one-year limitations period exists.

*Id.*, 395 F.3d at 589. As in this case, if a petitioner seeks to challenge his state conviction on various constitutional grounds and for one reason or another his motion is untimely even though he is actually innocent and diligent in pursuing the claim, that petitioner is foreclosed by the one year limitation period of 28 U.S.C. § 2244(d)(1). Yet, a petitioner who files a second or successive petition after his first petition has been dismissed as untimely or for other reasons, may have his successive petition considered initially by a court of appeals and then by a district court, regardless of when the successive petition is filed if he can demonstrate a credible claim of actual innocence, *i.e.*, that a reasonable jury would not have convicted the petitioner had it known the evidence of actual innocence. 28 U.S.C. § 2244(b) provides in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—. . .
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

An actually innocent person who files a successive habeas petition has an opportunity to have his claim heard even if it is

beyond the one year limitation period applied to initial petitions. Here, the petitioner has consistently argued and the district court found that he is actually innocent. After three days of testimony, the petitioner proved his innocence under the *Schlup* standard.

The district court did not equitably toll § 2244(d)(1) so it could reach the petitioner's free standing constitutional arguments including the withholding of exculpatory material, prosecutorial misconduct, coercion of his plea, and the ineffective assistance of counsel at his plea in violation of the Sixth Amendment, although it did conclude that the plea was coerced. If "it is more likely than not that no reasonable juror would have found [the petitioner] guilty beyond a reasonable doubt," the petitioner may "pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. at 327. Yet even under this standard, a "petitioner need not show that he is actually innocent of the crime he was convicted of committing; instead, he must show that a court cannot have confidence in the outcome of the trial" by showing that is more likely than not that no reasonable juror would have convicted him. *Majoy v. Roe*, 296 F.3d 770, 776 (9th Cir. 2002) (internal citations omitted).

Thus, section 2244 is inherently inconsistent and an unconstitutional suspension of the writ because it allows a person to avoid the limitation period of 2244(d)(1) by raising a credible claim of actual innocence in a successive petition but leaves no savings clause exception for actual innocence for an initial petitioner. The statute simply does not take into consideration those who are actually innocent but do not timely file their initial petition and are therefore barred from consideration of their constitutional claims.

> The Eighth Circuit has noted correctly that § 2244(d)(1) "says nothing about actual innocence, even though other parts of AEDPA, enacted at the same time, do

> refer to this doctrine." *Flanders*, 299 F.3d at 977; *compare* 28 U.S.C. § 2244(d)(1) with 28 U.S.C. § 2244(b)(2)(B)(ii) and 28 U.S.C. § 2254(e)(2)(B).

*Souter*, 395 F.3d at 597. This absence of a savings clause under 2244(d)(1) could not have been Congress' intent.

> While it is true that Congress included an actual innocence exception to the procedural bars on successive habeas petitions and evidentiary hearings but not to the one-year limitations period, that does not give rise to the negative implication that the absence of an exception was intended. . . The fact that Congress adopted a narrower actual innocence exception in these two provisions is indicative, not of Congress's desire to exclude the exception with regards to the limitations period, but rather of its intent to limit the scope of the exception in those two specific areas. The more reasonable inference to be drawn from the absence of an exception in § 2244(d)(1) is that Congress intended not to alter the existing jurisprudential framework which allowed for a showing of actual innocence to overcome a procedural default.

*Souter*, 395 F.3d at 598-99. Thus, it is fundamentally unjust to allow a successive petition to proceed on actual innocence grounds regardless of when it is filed, but not allow an actually innocent person to file an initial petition because more than one year has elapsed for one reason or another.

It is respectfully submitted, however, that a petitioner's first habeas petition should have a broader actual innocence exception than a successive petition where recourse to the courts has already been had. *See Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."). In *Holloway*

v. *Jones*, 166 F. Supp. 2d 1185 (E.D. Mich. 2001) the district court specifically held that § 2244(d)(1) must contain an implied actual innocence savings clause to survive constitutional scrutiny:

> This Court concludes that to utilize the one year statute of limitations contained in the AEDPA to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause contained in U.S. Const. Art. I, § 9 cl. 2, as well as the Eighth Amendment's ban on cruel and unusual punishment. The Court therefore holds that an actual innocence exception exists to the statute of limitations contained within § 2244(d)(1).

*Id.*, 166 F. Supp. 2d at 1191. Section 2244(d)(1) should be declared unconstitutional and this matter remanded to the district court so that petitioner's free standing constitutional claims may be reviewed by the district court.

## IV. EQUITABLE TOLLING SHOULD BE GRANTED WHERE A RETAINED ATTORNEY FAILS TO FILE A STATE POST-CONVICTION MOTION AND THE PETITIONER CANNOT PURSUE HIS CLAIMS *PRO SE*. THIS IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Prior to 1996 there was no time limitation applied to the filing of a writ of habeas corpus by a person in state custody. Under 28 U.S.C. § 2244(d)(1), a prisoner in custody pursuant to a judgment of a state court now has a one-year period within which to file an application for a writ of habeas corpus. The limitation period runs from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A).

Under section 2244(d)(2), the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward the one-year period. Here, the petitioner's state court conviction became final on November 18, 1999 which was one year after the New York State Court of Appeals denied leave to hear the petitioner direct appeal (including the 90 days permitted to seek a writ of certiorari). *Williams v. Artuz*, 237 F.3d 147 (2d Cir. 2001).

The court of appeals has previously held that where an attorney abandons a client and as a result fails to timely file a post-conviction motion, that client may be entitled to equitable tolling of the limitation period of section 2244(d)(1). *See Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003). The court of appeals declined to apply *Baldayaque* in this case. Other courts have similarly held. *See, e.g., Wessinger v. Cain*, 358 F.Supp.2d 523 (M.D.La., 2005); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 237-38 (3d Cir. 1999).

In *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003) the Ninth Circuit held that the conduct of the inmate's attorney was sufficiently egregious to justify equitable tolling of the one-year limitation period.

> The attorney was hired nearly a full year in advance of the deadline, and he completely failed to prepare and file a petition. The inmate contacted the attorney numerous times, by telephone and in writing, but his efforts were fruitless. Despite a request that the attorney return the inmate's file, the attorney retained it for the duration of the limitations period and more than two months beyond. That conduct was so deficient as to distinguish it from the merely negligent performance of counsel.

*Id.*, at 799. This conduct was similar to the behavior of the petitioner's retained attorney who agreed to file the state post-

conviction motion within the limitations period of § 2244(d)(1), and failed to do so after being paid. This situation was further complicated by the petitioner's incarceration on an unrelated federal charge because he had limited communication with his attorney, could not leave the prison to do his own investigation and seek sworn statements from witnesses, the state conviction enhanced his federal sentence, and he did not have access to state legal materials in a federal prison so he could file the motion *pro se*. It is undisputed that the attorney was an alcoholic and "faker" who took the petitioner's money and disappeared without doing anything he had promised. It is also significant that the petitioner could not have filed the post-conviction motion *pro se* because he had no access to legal materials on state post-conviction procedures. *See Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (prison library inadequacy was extraordinary circumstance permitting equitable tolling); *Egerton v. Cockrell*, 334 F.3d 433 (5th Cir. 2003).

In *Egerton* the court concluded that "[t]he State's failure to make available to a prisoner the AEDPA, which sets forth the basic procedural rules the prisoner must follow in order to avoid having his habeas petition summarily thrown out of court [constituted] an impediment" under § 2244(d)(1)(B). *Id.*, at 438. Accordingly, the court held that the one-year limitations period did not begin to run until the petitioner was transferred to a facility where a copy of AEDPA was available. Here, the absence of state legal materials in the federal prison library was an impediment to the petitioner proceeding *pro se*.

The petitioner filed his state post-conviction motion on May 10, 2000, which was 173 days late. It is clear from the facts of this case that the petitioner was laboring under the belief that his retained attorney was handling the matter for him when in fact the attorney had taken his money, misled him and abandoned him while providing credible assurances that the work was being done. It was not unreasonable for the petitioner,

who was incarcerated at the time, to have trusted his attorney to file the motion.

Because the district court found the petitioner actually innocent, the plea coerced, and his efforts at pursuing his claims reasonably diligent, the district court should have equitably tolled the limitations period of section 2244(d)(1). Pet. App. 120a.

## CONCLUSION

The petition for a writ of certiorari should issue on the questions raised herein.

Respectfully submitted,

MICHAEL S. POLLOK
*Attorney for Petitioner*
260 Madison Avenue-22nd Floor
New York, New York 10016
(212) 679-2900

# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 19, 2004

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2003

Argued: December 17, 2003 Decided: November 19, 2004.

Docket No. 03-2432.

JOHN DOE,

*Plaintiff-Appellant,*

v.

FREDERICK MENEFEE, Warden of the Otisville Federal Correctional Institution; THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

*Defendants-Appellees.*

Before: MESKILL, POOLER, and SOTOMAYOR, *Circuit Judges.*

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York (Brient, J.), denying his petition for a writ of habeas corpus. Although he failed to file his habeas petition within the one-year statute of limitations provided by the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. §

2244(d) (2000), petitioner argues that the statute of limitations should be tolled because (1) he is actually innocent of the offense for which he was convicted; (2) his attorney's incompetence prevented him from filing his state post-conviction motion in time to toll AEDPA's limitations period; and (3) he was incapable of filing his state post-conviction motion *pro se* because the library of the federal prison in which he was incarcerated did not contain New York State case law. We hold that (1) contrary to the district court's conclusion, Doe did not satisfy his burden of making a credible showing of actual innocence; (2) Doe did not exercise reasonable diligence during the period that he seeks to have tolled for attorney incompetence; and (3) Doe is not entitled to equitable tolling on the basis of the purported inadequacies of the library of the federal prison in which he was incarcerated because he has not established that the library lacked materials adequate to prepare his state post-conviction motion.

AFFIRMED.

Judge Pooler dissents in a separate opinion.

*Appendix A*

SOTOMAYOR, *Circuit Judge:*

Petitioner-appellant John Doe[1] appeals from the decision of the United States District Court for the Southern District of New York (Brieant, J.), denying his petition for a writ of habeas corpus.[2] Although Doe seeks to challenge his 1995 New York State conviction for second-degree sodomy, he failed to file his petition within the limitations period provided by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1). Doe argues that the limitations period should be tolled because he is actually innocent of the offense to which he pled guilty, because the attorney whom he hired to file his state post-conviction motion incompetently failed to file the motion in time to trigger the tolling provision provided in 28 U.S.C.

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1. After oral argument, we requested supplemental briefing on whether "John Doe" should have been permitted to litigate under a pseudonym. The judge below granted use of the pseudonym ex parte, without giving appellees an opportunity to be heard. However, upon learning of the order, appellees failed to make a motion for reconsideration, and have not raised the issue on appeal. We decline to address the complex question of the applicable standards for litigating under a pseudonym under these circumstances.

2. Doe's petition challenges his state custody, resulting from his New York State conviction for second-degree sodomy, pursuant to 28 U.S.C. § 2254. The official caption reflects the fact that Doe named as one of the respondents Frederick Menefee, warden of the federal correctional institution in which Doe was incarcerated at the time that he filed this petition. The parties have agreed that Attorney General of the State of New York is the only proper respondent, however, and have litigated this matter accordingly. The district court recognized this in an order dated January 4, 2002.

§ 2244(d)(2), and because the unavailability of New York State case law in the library of the federal prison in which he was incarcerated rendered him unable to file his state post-conviction motion *pro se*. Although the district court found that Doe was actually innocent, it declined to hold that actual innocence provides a basis for tolling AEDPA's limitations period, and it also rejected Doe's other asserted bases for tolling.

On appeal, Doe argues that because he has presented a credible claim of actual innocence, the Suspension Clause, the Eighth Amendment, and due process mandate that AEDPA's limitations period be equitably tolled. With respect to the attorney competence issue, he asserts that our decision in *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003), issued after the district court's ruling on the issue, necessitates reversing the court's finding that the incompetence of Doe's attorney did not warrant tolling. Finally, Doe argues that the district court erred in holding that his claim of prison library inadequacy could not serve as a basis for equitable tolling. Because any one of these grounds is sufficient to toll the limitations period, Doe maintains, he should be given the opportunity to have his constitutional claims adjudicated on their merits.

We hold that the district court relied on clearly erroneous findings of fact in determining that Doe had presented new reliable evidence of innocence and was actually innocent. With respect to Doe's attorney incompetence argument, we affirm the court's conclusion that Doe failed to exercise reasonable diligence, and thus do not reach Doe's contention that his attorney's incompetence is sufficiently egregious to

warrant tolling under *Baldayaque*. We also affirm the court's holding that Doe is not entitled to tolling based on purported inadequacies of the prison library because Doe's post-conviction motion relied largely on federal law.

## BACKGROUND

### I. Doe's Second-Degree Sodomy Conviction

The following facts are taken from the affidavits and transcripts in the record, as well as from the testimony given at the evidentiary hearing conducted before the district court in March 2003, and are essentially undisputed. Any factual disputes that have arisen during the habeas proceedings will be treated in greater detail in the discussion of the hearing testimony, below.

John Doe's second-degree sodomy conviction was the result of a long-running investigation, conducted jointly by federal and state law enforcement agencies, into a ring of pedophiles based in New York, New Jersey and Maryland. The ring was composed of men who called themselves "Boy Lovers," a phrase that Doe defined as men who liked to have sex with young boys, and its activities consisted of exchanging and creating child pornography, "seducing" and sharing victims, and soliciting child prostitution.[3] Although

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3. Doe provided a detailed description of the Boy Lovers' victims and "seduction" methods in his testimony as a federal cooperator against two fellow Boy Lovers. The men would choose victims, generally pre-teen and teenage boys from disadvantaged backgrounds, and ingratiate themselves by taking the boys to arcades (Cont'd)

the exact dates of Doe's affiliation with the group are unclear, it appears that he was friendly with its principals, and participated in its activities, beginning in the early 1980s and continuing at least through 1993. Doe's activities as a member of the group apparently never gave rise to a criminal investigation prior to 1993, although Doe did have one sex offense conviction in Maine, stemming from his 1975 attempt to pay two young boys to pose for pornographic pictures.

During the summer of 1993, New York and New Jersey state and federal investigators were investigating the activities of two members of the group, Richard Bagarozy and Edward Federowicz, who were suspected of creating and warehousing child pornography and transporting boys from New York to New Jersey for sex. Investigators for the Westchester County District Attorney's Office in New York ("the DA's Office") conducted several wiretaps of Bagarozy

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and fast food restaurants. Doe stated that sometimes a boy's parents would be given financial assistance, especially if the Boy Lover thought that the parents were aware that their son was being groomed for sex. After having obtained the boy's trust, the Boy Lover would invite him to a nude beach, which would serve the dual purposes of acclimating the boy to a more erotic relationship, and allowing the pedophile to evaluate the boy's willingness to engage in eventual sexual acts. According to Doe, eventually the process would culminate in a sexual relationship, during which the Boy Lover would continue to give money to, and do favors for, the boy and his friends and family. The boy would also be coached on how to deceive the authorities, and might be used to create child pornography, which would then be shared amongst the Boy Lovers. Some boys were shared between Boy Lovers, and certain boys would be used to recruit potential new victims.

and Federowicz, and became alerted to Doe's existence when, on August 17, 1993, they overheard Bagarozy and Federowicz discussing how Doe had recently had sex with a boy named Edwin[4] and had paid him afterwards.[5] In later wiretaps, Doe was overheard discussing Edwin with Federowicz in a sexually explicit manner. Based on this information, the DA's Office attempted to locate Edwin in order to determine whether a crime had been committed, but did not succeed in doing so until February 1994.

Meanwhile, the FBI also had begun to investigate Doe as a member of the Boy Lovers. On September 9, 1993, the FBI and investigators from the DA's Office and other state authorities searched Doe's Westchester County apartment as

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4. The surnames of all victims who were minors at the time of the events in question have been redacted throughout this litigation in order to protect the victims' privacy.

5. Although these wiretaps were not introduced into evidence below, two witnesses testified as to their substance. In addition to the conversation between Bagarozy and Federovich, investigators overheard a conversation between Bagarozy and Doe, in which they discussed Edwin, and Bagarozy informed Doe that Edwin preferred Doe to fellow Boy Lover Bill O'Rourke. In subsequent conversations, Doe mentioned Edwin in the course of a sexually explicit conversation about boys' genitalia. As discussed below, the Supreme Court's actual innocence case law would allow us to consider these tapes or transcripts as substantive evidence for purposes of the actual innocence determination, even though some of the statements contained on tapes might not be admissible at a trial. *See Schlup v. Delo*, 513 U.S. 298, 327 (1995). Because respondents refused to proffer the tapes as evidence, even after the court inquired as to their evidentiary value, we will not consider them as substantive evidence here.

part of a coordinated series of searches and arrests intended to break up the ring. The investigators recovered items of child pornography from Doe's apartment, and the United States Attorney's office for the Southern District of New York initially considered prosecuting him on child pornography charges, although it is not clear how far these deliberations progressed. Six days after the search, on September 15, Doe and his attorney, Murray Richman, met with federal investigators for the purpose of determining whether Doe had sufficient knowledge of the Boy Lovers' ring to warrant offering him a plea bargain in return for his cooperation.[6] Doe spoke with the federal investigators pursuant to a proffer agreement that guaranteed that the United States would not use any of his statements against him in any judicial proceeding, except for purposes of cross-examination or rebuttal.[7] During the proffer session, Doe provided a detailed

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6. The session was run and recorded by the federal investigators, including representatives of the FBI and the United States Attorney's Office of the Southern District of New York. Although at least one representative of the New Jersey state authorities was present, both the evidentiary hearing testimony and the documents recording the session indicate that nobody from the Westchester DA's Office participated in the session. Richman testified at an evidentiary hearing, however, that somebody from the DA's Office was present.

7. It is unclear whether the agreement binds any state law enforcement agency, as the agreement refers only to "this Office," a reference to the United States Attorney's Office, and the only representative of a state law enforcement agency who signed the agreement appears to have signed as a witness rather than as a party. The agreement itself indicates that the DA's Office was not a party to the agreement, however, as no representative of that office has

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description of the Boy Lovers' "seduction" methods, the names of their victims, as well as an account of his personal involvement with Bagarozy and Federowicz and his own sexual acts with children. He volunteered that "in the last couple months," he had had sex with a boy named Edwin, who was also sexually associated with Bagarozy. This would place the encounter in July or August of 1993. According to Doe, "the sex included oral copulation and masturbation."

Doe participated in a second proffer session in October 1993, where he provided more information about Bagarozy's and Federowicz's activities, but apparently did not discuss his own activities with Edwin.[8] Although Doe himself was still under investigation for federal crimes at that time, at some point the federal government decided not to charge him. Nonetheless, Doe continued to work with Special Agent James Kyle of the FBI, providing information regarding the ongoing activities of the Boy Lovers and assisting the FBI in locating Bagarozy's stash of child pornography. In February 1995, Doe testified for the government in the federal trial of

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signed the agreement in any capacity. *See United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir.1990) (holding that scope of use immunity provided in proffer agreement is governed by contract law principles).

8. The parties, including a representative of the Westchester DA's Office, signed a different immunity agreement during this proffer session. Because all of Doe's admissions with respect to Edwin occurred during the September 15 proffer session, however, Doe's statements during the October session are not included in the record, and the October immunity agreement is irrelevant for our purposes.

Bagarozy and Federowicz, where he provided extensive evidence of the Boy Lovers' activities and victims, as well as the defendants' individual proclivities and creation of child pornography.

Meanwhile, investigator Pat Storino of the DA's Office was investigating the connection between Doe and Edwin on the basis of the August wiretaps. Storino located Edwin on February 3, 1994, but did not attempt to question him about his contact with Doe. Also in early February, Doe told Special Agent Kyle that Edwin had attempted to contact Doe because O'Rourke had recently gotten out of prison and had coached Edwin and another underage victim, Edward R., on how to deceive the authorities. According to Doe, Edwin wanted Doe to know that he had promised not to say anything incriminating to any law enforcement authorities. Special Agent Kyle transmitted this information to the DA's Office on February 10.

In March 1994, the DA's Office interviewed Edwin on two separate occasions. Assistant District Attorney ("ADA") Elizabeth Cronin[9] of the Special Prosecutions Division, which handles domestic violence and child abuse cases, conducted the interviews. In accordance with the DA's Office's customary practice when dealing with underage victims, the interviews were not recorded and Edwin was not asked to sign a written statement, so Cronin's handwritten notes provide the only record of the substance of Edwin's statements. During the first interview, Cronin elicited general

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9. Ms. Cronin is now the Director of the Office of Legal Affairs in this Court.

information about Edwin's relationship with Doe and Doe's practice of taking Edwin and his friends out for hotdogs at Nathan's, a fast food restaurant, to arcades, and back to Doe's apartment to play video games. Cronin's notes taken during the second interview, on March 18, 1994, indicate that Edwin told her that Doe had on earlier occasions attempted to "grab [Edwin's] crotch" while driving him to Nathan's, and had at least once tried to force Edwin onto the bed in Doe's apartment. On August 13, 1993, Edwin went to Doe's apartment to play computer games, and Doe tried to pull down Edwin's pants while Edwin was sitting at the computer. Doe then grabbed Edwin, took him to the bedroom, threw him down on the bed, pulled his pants down, and put his mouth around Edwin's penis. Edwin was able to shake Doe off by kicking him, and Doe later drove Edwin home and gave him $50. Edwin also provided a detailed description of Doe's apartment, which Cronin later verified, and indicated that he remembered when the alleged forcible contact had occurred because it was the Friday before he moved on August 15, 1993, which places the incident on August 13.

In October 1994, Cronin notified Doe's attorney, Murray Richman, that the DA's Office intended to prosecute Doe for attempting to have sex with Edwin. Richman protested, asserting that the use immunity agreements that Doe had signed during his proffer sessions prohibited the DA's Office from prosecuting Doe for any offense that he had described during the proffer session. Cronin maintained that the September 15 use immunity agreement did not purport to bind the DA's Office, and offered to allow Doe to plead to second-degree sodomy, with a sentence of probation, rather than to a forcible sodomy charge that would mandate a prison

sentence. Angry that Richman had apparently misconstrued the immunity agreement, Doe fired him and retained another lawyer, who negotiated the plea bargain.

In February 1995, Doe pled guilty in Westchester County Court to one count of second-degree sodomy. During the plea allocution, Doe was asked, "Do you admit that you, in the Village of Tarrytown . . . on or about and between July 1st of 1993 and August 13th of 1993, being 18 years of age or more, engaged in deviate sexual intercourse with a person less than 14 years of age, consisting of contact between mouth and penis?" Doe, under oath, admitted the charge. Approximately ten months after entering the guilty plea, Doe rehired Richman and attempted to withdraw his plea on the basis of an alleged jurisdictional defect, but did not assert his actual innocence. The motion was denied, and Doe was sentenced to five years' probation in January 1996. The Appellate Division affirmed the conviction in relevant part in September 1997, and denied leave to appeal on August 19, 1998. The AEDPA limitations period therefore began running on November 19, 1998, after the 90-day period to seek certiorari with the United States Supreme Court expired. *See Pratt v. Greiner,* 306 F.3d 1190, 1195 & n. 1 (2d Cir.2002). Doe did not immediately file a state collateral challenge to his conviction pursuant to New York Criminal Procedure Law § 440.10.

In November 1998, Doe was arrested on federal charges of conspiring to receive and possess child pornography over the internet.[10] After it became apparent that the New York

10. The federal complaint alleged that Doe, by his own admission, had downloaded some 46,000 images of child (Cont'd)

second-degree sodomy conviction would adversely affect Doe's sentencing under the United States Sentencing Guidelines,[11] Doe retained attorney Patrick Wall in February 1999 to collaterally attack the conviction in New York Supreme Court by filing a § 440 motion. Because Doe was incarcerated in a federal facility at the time, he gave his brother, Peter Gould, a power of attorney to enable him to retain, pay and supervise Wall. Despite Doe's and Gould's supervision, Wall decided to delay filing the § 440 motion until the federal pre-sentence report was completed, at least in part because the motion might not be necessary if the pre-sentence report did not use the sodomy conviction to enhance Doe's sentencing calculation. When the AEDPA limitations period expired on November 19, 1999, Wall had not yet filed the § 440 motion, thereby losing the opportunity to invoke 28 U.S.C. § 2244(d)(2)'s provision for tolling the limitations period during the pendency of a state post-conviction motion. By February 2000, it was apparent that Wall's various health problems were preventing him from working on the motion, and Doe fired him. Doe finally filed the § 440 motion in May 2000, alleging that the DA's Office withheld exculpatory evidence, committed prosecutorial misconduct by breaching the federal use immunity agreements, and coerced his guilty

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pornography, digitized a video of children having sex that was filmed by his co-defendant, and possessed the equipment necessary to create, duplicate, and enhance the viewing quality of videos and CDs containing child pornography.

11. Doe pled guilty to the federal child pornography charges in the Eastern District of New York in April 2000. Because of his prior conviction, the district court applied a five-level enhancement, resulting in a statutory mandatory minimum sentence of sixty months.

plea. The motion was denied in June 2001,[12] and the Appellate Division denied leave to appeal in November 2001.

## II. Doe's Federal Habeas Petition

### A. Initial Proceedings

Doe filed the instant petition on November 30, 2001, just over two years after AEDPA's limitations period had run. He conceded that his petition was untimely, but raised the three tolling arguments at issue here, although in a less developed form. With respect to the actual innocence issue, Doe proffered an affidavit in which Edwin stated that Doe never molested him and that he never told the DA's Office that Doe had attempted to have any sexual contact with him. The district court found, however, in an order dated February 2002, that a claim of actual innocence did not provide a basis for tolling AEDPA's limitations period, noting "the clear intent of AEDPA to bring repose to state convictions in the federal courts, whatever the social cost." The court also denied Doe's tolling claim based on attorney incompetence, finding that our decision in *Smaldone v. Senkowski,* 273 F.3d 133 (2d Cir.2001) (per curiam), mandated the conclusion that Wall's lack of diligence was insufficient to constitute "extraordinary circumstances" meriting equitable tolling. Finally, the court implicitly held that Doe could have filed his petition *pro se* despite his incarceration.

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12. In considering the § 440 motion, the County Court denied Doe's challenges on their merits and did not address whether the affidavit in which Edwin asserted that he never accused Doe of sexual assault raised any issue of actual innocence.

On appeal, we declined to review the merits of the district court's rulings. We stated that this Court has "not yet determined whether the Constitution requires an actual innocence exception to [AEDPA's] statute of limitations," but that we would decide this issue in the context of a case in which the petitioner's credible showing of actual innocence "compels us to do so." *Doe v. Menefee*, 49 Fed.App. 340, 341-42 (2d Cir.2002) (unpublished opinion) ("Doe *I*") (internal quotation marks and citations omitted). Noting that "Doe has presented evidence, the affidavit of his alleged victim, which might well lead a reasonable juror to find him not guilty," but that "the respondent also has presented extensive evidence undermining the victim's affidavit," we remanded the case to the district court to determine whether "Doe has presented a credible claim of actual innocence." *Id.* at 342. We also directed the court to consider whether a petitioner must demonstrate that he pursued his claim of actual innocence with reasonable diligence, as is required in asserting other grounds for equitable tolling. *Id.* Finally, we declined to consider Doe's arguments with respect to attorney incompetence and the inadequacy of the prison library. *Id.*

**B. The Evidentiary Hearing on Remand**

On remand, the district court conducted a hearing on the actual innocence issue, after which it determined that Doe had "established his innocence by a preponderance of the credible evidence." The court heard testimony from Doe, Edwin, Richman, Cronin, Storino, and ADA Greg Bernhard on the issue of actual innocence, and from Peter Gould on the issue of Doe's reasonable diligence in pursuing his claim. The testimony that is relevant to the disposition of this appeal is summarized below.

*Appendix A*

**1. Doe**

Doe testified that he met Edwin through Edward R., one of the boys most closely connected with Bagarozy, early in the summer of 1993. Doe assertedly did not realize at the time, however, that Edward R. was sleeping with Bagarozy, and was used by Bagarozy and Federowicz to identify and attract new victims. Although Doe was not very close to Bagarozy and Federowicz and was not aware of the bulk of their activities, he associated with many of the same boys as did the two convicted pedophiles. Doe attributed this overlap in association to the fact that he routinely made himself available to underprivileged boys like Edward R. and Edwin, taking them to arcades, to Nathan's for hotdogs, and occasionally back to his apartment to watch movies and play video games.

On August 13, 1993, the date of the alleged assault, Doe picked up Edwin from the Bronx and drove him, alone, to Doe's apartment in Tarrytown. Doe had just finished work, and wanted to change into casual clothes before he took Edwin to Sportstime, an arcade. At Doe's apartment, Edwin waited while Doe changed, and the two were alone in the apartment for perhaps ten minutes. Doe denied having sex with Edwin or having attempted to force him into sexual contact.

Doe maintained that even after August 13, Edwin continued to call him and ask to be taken out. They appear to have met just once, though, in July 1994, when Doe, O'Rourke, and Edwin went to Playland Park in Westchester County. Doe stated that Edwin told him that the DA's Office

had approached him with questions about Doe, but that Edwin had denied any improprieties.

When questioned as to why he pled guilty to second-degree sodomy when he was innocent of the offense, Doe asserted that he felt coerced into pleading because he was frightened that he would be charged with a more serious offense—and face prison time—if he did not plead. Moreover, Doe was anxious to help the federal government convict Bagarozy and Federowicz, because he had been completely unaware of their more unsavory activities—including having sex with Edward R. and others, and using the boys to make child pornography—and felt betrayed because he himself would not have countenanced such exploitation. Doe believed that if he did not plead guilty to the sodomy offense, the federal prosecutors running the Bagarozy/Federowicz trial would be angry, and that the possibility that he would have to invoke the Fifth Amendment while on the witness stand could jeopardize his ability to function as a cooperator.

Doe also attempted to explain his admission at the September 1993 proffer session that he had had sex with Edwin by stating that he had "panicked" when asked about Edwin. He stated that the proffer was held "in a small, airless, windowless room" "at the end of the summer . . . [and] it was extremely hot." Doe was worried that he "was not going to be able to explain to these agents . . . what [his] role in [the Boy Lovers] was, which was not a criminal role," and he therefore "lied" and stated that he had had sex with Edwin.

*Appendix A*

**2. Edwin**

Edwin's testimony roughly corroborated Doe's, although the two accounts vary in some respects. Edwin stated that he was never alone with Doe in Doe's apartment, and had never had sexual contact, consensual or forcible, with Doe.

Edwin was approached by the DA's Office in early 1994, and went to one meeting with ADA Cronin.[13] He recalled that Cronin was the only person involved in the interview until a man came in towards the end, but he admitted that his recollection of the particulars of the interviews was unclear. Cronin asked Edwin if Doe ever "gave [him] money for sexual favors or anything like that," and Edwin replied that no sexual contact had ever occurred.

With respect to his larger involvement with the circle of Boy Lovers, Edwin testified that he played on a basketball team organized by Bagarozy, and knew of O'Rourke through Bagarozy but had never met him. He further testified that Bagarozy invited him to a nude beach once, but he refused. None of the men ever gave Edwin money or other financial assistance.

Edwin learned that Doe had been convicted of an offense involving the August 1993 incident when Edwin was incarcerated at Rikers Island in 1998. There, Edwin was approached by Edward R.'s brother, Angel R., who had been closely associated with O'Rourke and was known as one of the Boy Lovers' main boys. Angel R. told Edwin that Doe was "in jail because of" Edwin, leading Edwin to attempt to

13. Edwin's affidavit states that Edwin attended two meetings.

contact Doe. Doe refused to speak with Edwin because of an order of protection arising from the 1995 conviction, but soon after Edwin attempted to initiate contact, Doe sent a private investigator to speak to Edwin. Doe's attorney then generated an affidavit that Edwin signed, asserting that he had never told the DA's Office that Doe assaulted him. Doe also retained an attorney for Edwin, ostensibly to protect Edwin against "pressure" from the DA's Office. Finally, Edwin maintained that he was not promised anything in exchange for his testimony at the hearing; he was willing to testify because "the truth needs to be told."

### 3. Elizabeth Cronin

Cronin recounted her interviews with Edwin after refreshing her recollection with the notes that she took during the interviews. Cronin testified that of seven pages of notes, the first four, dated March 18, 1994, were taken during her second interview with Edwin. The next two pages, undated, were taken during the first interview, and the last page of notes may have been taken later, when Cronin was preparing for a proceeding. The notes were then offered into evidence, and are included in the record.

According to Cronin, the DA's Office conducted two interviews with Edwin because it was standard practice to conduct at least two interviews when dealing with a child victim. ADA Greg Bernhard, who had handled the investigation until the DA's Office decided to transfer the prosecution to the Special Prosecutions Division, was also present for both interviews. During the first interview, Cronin elicited general information about Edwin's relationship with

Doe and how the two had met. The second interview covered the alleged sexual contact and its aftermath.

Cronin stated that Edwin had met Doe through Edward R. in early summer, and that Doe would drive Edwin to various places. Sometimes Doe would attempt to touch Edwin's groin in the car. At some point before the alleged contact that formed the basis of the sodomy charge, Edwin, unaccompanied by any other boys, was playing on the computer in a back room in Doe's apartment when Doe came up behind him and attempted to put his hands down Edwin's pants. Doe told Edwin to stand up, and when Edwin struggled, Doe carried Edwin into the bedroom. When Edwin continued to struggle, Doe became angry and threatened not to drive Edwin home.

On August 13, 1993, Edwin again accompanied Doe back to his apartment. Doe's advances began as they had on the earlier occasion but went further this time; once Doe had maneuvered Edwin onto the bed, he pulled Edwin's pants down and put his mouth around Edwin's penis. Edwin pushed Doe's hands away and kicked him, and Doe retreated. Doe later accused Edwin of having provoked Doe into coming on to him, and gave Edwin $50 or $60. Cronin asked Edwin why he had accompanied Doe to his apartment after the first incident, which itself had involved an element of compulsion, and Edwin answered that he had thought that because he had made it clear to Doe that he did not like the advances, Doe would not come on to him again.

In accordance with standard practice, Cronin also asked Edwin to describe Doe's apartment in detail, in order to verify

that Edwin had actually been there. Cronin was later able to verify Edwin's description with Storino's and Bernhard's knowledge of the apartment, based on their search of the property.

Based on the interviews with Edwin, the DA's Office decided to charge Doe with a sex offense, and Cronin contacted Doe's attorney, Murray Richman, to discuss the charges. Cronin told Richman that the DA's Office believed it had sufficient evidence to charge Doe with forcible sodomy, a Class B felony that would carry a sentence of prison time, but that because Doe was cooperating with the federal government in the Bagarozy and Federowicz trial, the DA's Office was willing to consider charging Doe with second-degree sodomy, a Class D felony that would probably result in a sentence of probation.

**4. Greg Bernhard**

ADA Bernhard, who supervised the wiretaps and the search for Edwin and was present at Cronin's interviews, corroborated Cronin's testimony in its entirety. Bernhard testified that he had not reviewed Cronin's interview notes in preparation for his testimony, because he remembered the interviews "vividly." Bernhard had not expected Edwin to describe the sexual contact as forcible, because the wiretapped conversations had created the impression that because Doe paid him, Edwin was a willing participant in the encounter.

When asked to describe what allegedly occurred during Edwin's second visit to Doe's apartment,[14] Bernhard stated that Edwin told him and Cronin that he was playing computer games and that, while he was on the computer, Doe began grabbing at his legs and trying to turn him from the computer. Eventually Doe pulled Edwin off of the chair, threw him onto the bed, pulled his pants down, and put his mouth on Edwin's penis. Edwin kicked Doe and told him to stop.

### 5. Investigator Pat Storino

Finally, Storino testified as to his investigation into Edwin's whereabouts and the process by which the DA's Office learned of Edwin and the potential crime. Although the wiretaps were joint federal-state endeavors, no representative of the DA's Office was present at the September 15 proffer session in which Doe admitted to having sex with Edwin. The DA's Office's investigation into the incident was therefore conducted, at least at first, without knowledge of Doe's admission that he had sex with Edwin. Storino also testified that Special Agent Kyle contacted him in February and relayed Doe's statements that Edwin had been coached on what to say to the authorities, and had promised not to divulge any incriminating information.

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14. Bernhard was asked only about Edwin's second visit to the apartment, from which the sodomy charge arose. The first visit, presumably, was the one described in Cronin's notes, in which Doe attempted to molest Edwin, but did not succeed in having any sexual contact with him.

*Appendix A*

## C. The District Court's Findings and Conclusions

Following the hearing, the district court issued an order detailing its findings of fact and conclusions of law. The court analyzed the testimony in light of its conception of the standard for demonstrating actual innocence, stating that "the standard of proof is at the lowest possible level. Innocence need only be demonstrated to be more likely than unlikely."

The district court found Edwin's testimony credible in its entirety, as Edwin was "forthright . . . and responsive" in answering questions. The court concluded that although Edwin had "socialized" with Doe and other Boy Lovers, he "had not personally engaged in any sexual activity with Doe or any other man." Because crediting Edwin's accounts of what he had said during his interviews with Cronin required that the court discount or discredit Cronin's and Bernhard's directly conflicting testimony, the court concluded that Cronin's recollection was based primarily on her notes, "at least some of which are not contemporaneous records." Thus, although the court explicitly refused to make an adverse credibility determination with respect to Cronin, it found that Edwin's testimony was entitled to more weight. The court did not analyze or acknowledge the implications of Bernhard's testimony, however.

Turning to Doe's testimony, the court credited Doe's account of his relationship with Edwin and his explanations of his previous inconsistent statements. The court placed weight on the fact that although Edwin stated that he was never alone with Doe in his apartment, Doe admitted to having been alone with Edwin once, an inconsistency that

the court believed suggested Doe's forthrightness. The court also concluded that Doe had pled guilty because he was genuinely afraid of receiving jail time if he did not plead, and that his sense of betrayal arising out of Bagarozy's and Federowicz's activities made him particularly reluctant to endanger his ability to testify against them by refusing to plead guilty. The court also found Doe's discharge of Richman just before he pled guilty consistent with Doe's innocence, because Doe may have been loath to accept Richman's advice that he plead. This reasoning in turn suggested that Doe's admission of guilt during his plea allocution was false. Finally, the court found Doe's statement that he "panicked" at the proffer session and felt compelled to lie about having sex with Edwin "somewhat strained," but apparently did not feel that Doe's 1993 admission threw the veracity of his hearing testimony into doubt.

The court therefore concluded that Doe had established his innocence by a preponderance of the evidence. It next determined that Doe had exercised reasonable diligence in pursuing the claim of actual innocence, but reiterated its initial conclusion that AEDPA does not allow tolling for actual innocence, and the Suspension Clause does not require such an exception to AEDPA's limitations period.

## DISCUSSION

Doe challenges the district court's ruling that AEDPA's limitations period cannot be tolled based on a credible claim of actual innocence as well as its February 2002 rulings that Doe's claims of attorney incompetence and prison library inadequacy were insufficient to toll the limitations period.

Doe argues that each of these grounds entitles him to equitable tolling,[15] and that he therefore should have the opportunity to have his constitutional claims adjudicated on the merits.[16]

Although AEDPA does not provide that its limitations period may be tolled for any reason other than the pendency of a state post-conviction motion, *see* 28 U.S.C. § 2244(d)(2), in "rare and exceptional circumstances" a petitioner may invoke the courts' power to equitably toll the limitations period. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir.2000) (per curiam) (internal quotation marks and citations omitted). To qualify for such treatment, the petitioner must establish that "extraordinary circumstances prevented him from filing

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15. Even if Doe were to prevail on his argument that he is entitled to tolling based on actual innocence, however, it is not clear that such tolling would in itself be sufficient to render his petition timely. Doe never clearly established, and the district court made no finding with respect to, when Doe first learned of the new evidence that purportedly demonstrates his actual innocence. There is some indication in the record that Doe first learned of and investigated his alleged victim's willingness to testify that no sexual assault occurred as early as 1998 or 1999, well before the limitations period expired. If this were the case, any tolling that might arise from Doe's belated discovery of the new evidence might not in itself render his petition timely. We note, however, that the question of how tolling for actual innocence will be calculated need not be decided until we determine whether the limitations period may be tolled for actual innocence.

16. Doe also argues that there is sufficient evidence in the record to enable us to reach the merits and grant his habeas petition. In light of our disposition of the tolling issues, we need not reach this argument.

his petition on time," and that he "acted with reasonable diligence throughout the period he seeks to toll." *Id.* We have established only a limited number of circumstances that may merit equitable tolling, such as where an attorney's conduct is so outrageous and incompetent that it is truly extraordinary, *see Baldayaque*, 338 F.3d at 152, and where prison officials intentionally obstruct a petitioner's ability to file his petition by confiscating his legal papers, *see Valverde v. Stinson*, 224 F.3d 129, 133-34 (2d Cir.2000). We have specifically reserved the question of whether a claim of actual innocence based on newly discovered evidence constitutes an extraordinary circumstance that merits equitable tolling, however, as well as the question of whether the Constitution would require equitable tolling for actual innocence. *See Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 114 (2d Cir.2000).

With respect to Doe's claim of actual innocence, we hold that the district court misapprehended the standard for determining actual innocence as it is delineated in governing Supreme Court case law, and that its findings with respect to the credibility of Doe's and Edwin's hearing testimony were clearly erroneous. In adherence to our repeated statements that we will decide whether equitable tolling is available on the basis of actual innocence only in a case in which the petitioner has made a credible claim of actual innocence, therefore, we do not reach Doe's arguments that various constitutional provisions require that AEDPA's limitations period be tolled for actual innocence. With respect to the attorney incompetence issue, we agree with the district court's conclusion that Doe did not exercise reasonable diligence during the period that he seeks to have tolled. Finally, we affirm the district court's ruling that the purported

inadequacies of the library of the prison in which Doe was incarcerated do not provide a basis for tolling the limitations period, as Doe has not established that the library lacked adequate resources for him to prepare his state post-conviction motion.

**I. Tolling for Actual Innocence**

The doctrine of actual innocence was developed to mitigate the potential harshness of the judicial limitations placed on a petitioner's ability to file successive or otherwise procedurally defaulted habeas petitions in the federal courts. *See Schlup v. Delo*, 513 U.S. 298, 318-21 (1995) (describing development of limitations on the writ of habeas corpus and establishing contours of actual innocence exception). Prior to AEDPA's passage, procedural limitations on the right to seek habeas relief were judicially created to prevent the erosion of the values of comity and finality, which were threatened by repeated federal examination of state convictions. These procedural limitations were crafted and applied as equitable limitations that could yield in the face of countervailing considerations. *See id.* at 320-21. Thus, where a petitioner appears to be the "victim[ ] of a fundamental miscarriage of justice," the principles of comity and finality must yield to the imperative of federal judicial review of the conviction. *See Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). Accordingly, in a series of decisions, the Supreme Court established that prisoners may obtain federal habeas review, despite their state procedural default or previous federal habeas petitions, if they can demonstrate cause for the default and resulting prejudice. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (establishing

cause and prejudice standard in cases where petitioner is accused of abusing the writ); *Francis v. Henderson*, 425 U.S. 536, 542 (1976) (establishing cause and prejudice standard for federal review following state procedural default).

An independent category of cases in which petitioners may suffer miscarriages of justice if they are procedurally barred from filing habeas petitions is composed of those cases in which the petitioners claim that they are actually innocent of the crimes for which they were convicted. Thus, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Carrier*, 477 U.S. at 496. Because credible claims of actual innocence are "extremely rare," federal court adjudication of constitutional challenges by petitioners who may be actually innocent prevents miscarriages of justice, but does not threaten state interests in finality. *Schlup*, 513 U.S. at 321-22. Accordingly, a petitioner may use his claim of actual innocence as a "gateway," or a means of excusing his procedural default, that enables him to obtain review of his constitutional challenges to his conviction. *See id.* at 315-17. This remains the case after AEDPA, which codifies the actual innocence doctrine, with modifications not relevant here, as it applies to successive petitions and state procedural defaults. *See* 28 U.S.C. §§ 2244(b); 2254(e)(2).

Because AEDPA's one-year limitations period protects the same values of comity and finality as do the procedural limits on successive and defaulted petitions, *see Acosta v. Artuz*, 221 F.3d 117, 122-23 (2d Cir.2000), it is not surprising

that several habeas petitioners have attempted to argue that considerations of justice mandate adopting the actual innocence gateway as a means of tolling AEDPA's limitations period. *See, e.g., Whitley v. Senkowski*, 317 F.3d 223, 225-26 (2d Cir.2003). We have not yet decided this question, reasoning that we should decide whether the Constitution requires tolling for innocence only in a case in which the petitioner can show that, because he can demonstrate his actual innocence, he would be injured if not entitled to tolling on this basis. *See Lucidore*, 209 F.3d at 113-14. Thus, we have instructed district courts faced with untimely petitions in which the petitioner asserts his or her actual innocence to determine, in each case, whether the petitioner has presented a credible claim of actual innocence before ruling on the legal issues of whether such a showing provides a basis for equitable tolling and whether the petitioner must also demonstrate that he or she pursued his or her claim with reasonable diligence. *See Whitley*, 317 F.3d at 225.

Because the interests that must be balanced in creating an exception to the statute of limitations are identical to those implicated in the procedural default context, we see no reason not to apply the *Schlup* standard in the tolling context. Indeed, we have previously assumed that if actual innocence does provide a basis for tolling the limitations period, *Schlup*'s delineation of the evidentiary showing necessary to demonstrate actual innocence would apply in evaluating whether the petitioner had made a credible showing of actual innocence. *See Lucidore*, 209 F.3d at 114 (applying the *Schlup* standard and holding that petitioner had not demonstrated actual innocence).

The *Schlup* Court carefully limited the type of evidence on which an actual innocence claim may be based and crafted a demanding standard that petitioners must meet in order to take advantage of the gateway. The petitioner must support his claim "with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Because *Schlup* explicitly states that the proffered evidence must be reliable, the habeas court must determine whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record. *See id.* at 327-28, 115 S.Ct. 851.

Once it has been determined that the new evidence is reliable, *Schlup* unequivocally requires that reviewing courts consider a petitioner's claim in light of the evidence in the record as a whole, including evidence that might have been inadmissible at trial:

> [This] standard is intended to focus the inquiry on actual innocence. In assessing the adequacy of petitioner's showing . . . the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was excluded or unavailable . . . . [W]e believe that Judge Friendly's description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including

> that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

*Id.* (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L.Rev. 142, 160 (1970)). Our dissenting colleague asserts that under *Bousley v. United States*, 523 U.S. 614 (1998), a court may consider only *admissible* evidence when assessing the reliability of a claim of actual innocence. We disagree. As *Schlup* makes clear, the issue before such a court is not legal innocence but factual innocence. Integral to *Schlup* 's holding is an express command that reviewing courts consider *all* evidence without regard to its admissibility, while the portion of *Bousley* relied upon by the dissent is mere dictum.[17]

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17. The *Bousley* petitioner had procedurally defaulted his habeas claim by failing to challenge the validity of his plea. 523 U.S. at 621. The Court held that he had neither satisfied the exception to the procedural default rule nor overcome the rule by showing cause or prejudice. *Id.* at 622-23. In dicta, the Court suggested that petitioner's habeas claim might survive on remand if he could establish a claim of actual innocence. *Id.* at 623. After a terse summary of the actual innocence inquiry, the Court noted that "the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy." 523 U.S. at 624. The dissent argues that *Bousley* has therefore "clarified the type of evidence that can be considered in assessing actual innocence." However, we decline to treat this dictum

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Only after examining all evidence is the court able to determine whether new evidence truly throws the petitioner's conviction into doubt, or whether it is so overwhelmed by the weight of other evidence that it is insufficient to raise a question as to a petitioner's factual innocence. If the court then concludes that, in light of all the evidence, it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," a petitioner may invoke the actual innocence gateway and obtain review of the merits of his claims. *Schlup*, 513 U.S. at 327.

The actual innocence inquiry therefore has a hybrid structure: On the one hand, the court must make its own evaluation of the evidence, free of the strictures of the rules governing a trial, but on the other hand, the standard according to which the court must evaluate that evidence requires the court to determine the verdict that reasonable jurors would probably reach. Because in rare cases a finding of guilt beyond a reasonable doubt may not be synonymous with factual guilt, *Schlup* recognizes that the reviewing court must do more than reenact a trial of the petitioner; it must be

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as overruling *Schlup*'s square holding that reviewing courts must evaluate *all* the evidence. *Schlup*, 513 U.S. at 327-28. We also observe that *Bousley*'s summary of the actual innocence inquiry cites to that precise portion of *Schlup* discussing the importance of reviewing courts' consideration of both admissible and inadmissible evidence. *Bousley*, 523 U.S. at 623 (citing *Schlup*, 513 U.S. at 327-28). These conflicting signals—*Bousley*'s favorable citation to this fraction of *Schlup*, juxtaposed against the single word of dictum stressed by the dissent— reinforce our refusal to interpret *Bousley* as overruling *Schlup*.

free to evaluate independently all of the evidence, old and new, to determine whether that evidence may show that the petitioner is *factually* innocent. Because our legal system has no means of defining innocence independently of the finding of reasonable doubt, however, "the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 U.S. at 328. This two-step process allows the court to analyze the petitioner's potential innocence in light of the fact that the petitioner is essentially claiming that the criminal justice process has reached the wrong factual result, whether after a trial or a guilty plea.

Thus, taking into account "the probative force of relevant evidence," the court must consider how reasonable jurors, fairly examining all of the evidence presented, would assess the petitioner's guilt or innocence. *Id.* at 327-29. In evaluating the record as a whole, the habeas court may make its own credibility determinations as to both the new evidence and the evidence already in the record that may be thrown into doubt by the new material. *See id.* at 330. With respect to the ultimate issue of innocence, however, *Schlup* does not permit the court to make an independent judgment of whether reasonable doubt exists, but instead requires a "probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329. This probabilistic analysis must determine "not merely [whether] . . . a reasonable doubt exists in the light of the new evidence," but rather whether it is more likely than not "that no reasonable juror would have found the defendant guilty." *Id.; see also id.* at 333 (O'Connor, J., concurring) ("[A] petitioner does not pass through the [innocence] gateway . . . if the district court

believes it more likely than not that there is *any* juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt." (emphasis added; internal citation omitted)).

Because the determination as to whether no reasonable juror would find a petitioner guilty beyond a reasonable doubt is a mixed question of law and fact, we review the district court's ultimate finding of actual innocence *de novo*. *See United States* ex rel. *Bell v. Pierson*, 267 F.3d 544, 551-52 (7th Cir.2001) (noting that district court must make factual findings with respect to new evidence, but concluding that district court is no better placed than appellate court to make probabilistic determination as to what reasonable juror would find and concluding that review is therefore *de novo*); *cf. Pham v. United States*, 317 F.3d 178, 182 (2d Cir.2003) (stating that mixed questions of law and fact presented in a habeas petition are reviewed *de novo*).

We review the district court's underlying findings of fact under the more deferential clearly erroneous standard. *See* Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Clear error review permits only limited reexamination of factual findings where "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 573-74. The reviewing court may reverse, however, when, although there is evidence to support the finding, "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

By the same token, although Rule 52(a) "demands even greater deference to the trial court's" credibility determinations, the district court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Id.* at 575. Thus, reviewing for clear error allows an appellate court to examine the district court's credibility determinations in light of the evidence in the record as a whole, in order to determine whether the credibility assessment can be reconciled with other evidence: "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Id.* Where, however, two witnesses have each told a "coherent and facially plausible story that is not contradicted by extrinsic evidence," the trial court's decision to credit one witness over the other, "if not internally inconsistent, can virtually never be clear error." *Id.* at 575-76.

We have found a district court's factual findings to be clearly erroneous where the court has failed to synthesize the evidence in a manner that accounts for conflicting evidence or the gaps in a party's evidentiary presentation. Thus, we have reversed factual findings where the trial court incorrectly assessed the probative value of various pieces of evidence, leading it to rely on speculation, *see United States v. Rizzo*, 349 F.3d 94, 100-02 (2d Cir.2003), and where the court failed to weigh all of the relevant evidence before making its factual findings, *see Ortega v. Duncan*, 333 F.3d 102, 107 (2d Cir.2003). Moreover, we have found the trial court's credibility determinations vulnerable where they were

founded on factual inferences that the evidence did not permit. *See Krizek v. Cigna Group Ins.*, 345 F.3d 91, 100-01 (2d Cir.2003). *Accord Jiminez v. Mary Washington College*, 57 F.3d 369, 380-81 (4th Cir.1995) (reversing district court's discrediting of five semesters of students' assertions against a professor denied tenure as tainted by racial animus and finding that the district court's conclusion of taint was based on speculation and was inconsistent with the other evidence in the record); *Hayes v. Invesco, Inc.*, 907 F.2d 853, 856-57 (8th Cir.1990) (holding that fact findings were clearly erroneous where the district court misinterpreted some evidence and failed to consider some testimony).

**A. The District Court's Factual Findings**

We hold that the district court's finding that the hearing testimony of Doe and Edwin constitutes reliable evidence of Doe's actual innocence was clearly erroneous. While we recognize that district courts are generally best placed to evaluate testimony in light of the witnesses' demeanor, credibility determinations are not composed of demeanor evaluations alone. Even where a court finds that a witness appears to be telling the truth, it must, as *Anderson* recognizes, evaluate the testimony in light of the substance of other evidence, considering the potential motives to be untruthful that the witness may possess, corroboration or the lack thereof, internal consistency, and the inferences or assumptions that crediting particular testimony would require. *See Anderson*, 513 U.S. at 575.

This is particularly true in the context of an actual innocence determination, as *Schlup* requires the habeas court

to determine whether the new evidence on which the actual innocence claim is based is reliable. *See Schlup*, 513 U.S. at 324. In order to make this assessment where, as here, the new evidence consists entirely of testimony that challenges the facts on which the prosecution relied in obtaining the conviction, the court must carefully consider the nature of the testimony in light of the existing record to determine whether it can be considered reliable. *See id.* at 327-38; *Anderson*, 470 U.S. at 575. The court's conclusion that it believes a witness's testimony at an evidentiary hearing is only one element of the determination that the testimony constitutes new reliable evidence. The court must then evaluate whether its subjective impression of the testimony can be sustained in light of the record as a whole.

Having reviewed the testimony of Doe and Edwin in light of Doe's prior statements and admissions of guilt and the other evidence in the record, we are left with the "definite and firm conviction" that the district court committed clear error in crediting the testimony. *See Anderson*, 470 U.S. at 573. We therefore find that neither Doe's nor Edwin's testimony constitutes new reliable evidence.

**1. Doe**

Doe testified that he never attempted to have any sexual contact with Edwin and that his relationship with Edwin consisted solely of taking him to arcades and fast food restaurants at Edwin's behest. The district court's reasons for finding that Doe's testimony had the "ring of truth" and crediting it in its entirety were deeply flawed. We therefore find that Doe's testimony does not constitute reliable evidence of his innocence.

*Appendix A*

As an initial matter, the district court relied on a misinterpretation of the evidence in concluding that the truthfulness of Doe's hearing testimony was buttressed by his conduct around the time of his guilty plea. The court found that just before Doe pled guilty, he fired his lawyer, Murray Richman, because Richman suggested that Doe plead guilty despite his innocence. The court then inferred that Richman's firing was consistent with Doe's claim of innocence. Both Doe and Richman testified unequivocally, however, that Doe fired Richman because Richman had incorrectly advised Doe that his 1993 use immunity agreement would prevent all state authorities, including the DA's Office, from prosecuting him. The district court acknowledged and credited Doe's testimony on this point, rendering its fact findings internally inconsistent.

A review of the record leads to the conclusion that none of Doe's conduct during the investigation and around the time of his guilty plea is sufficient to permit the inference that Doe was actually innocent. The district court therefore should have determined whether it could credit Doe's recent protestations of innocence, without more, over his admission during the 1993 federal proffer session that he had sex with Edwin.[18] This analysis requires an examination of the

18. The use immunity provided to Doe as an incident of his participation in the September 1993 proffer session does not preclude us from considering the substance of Doe's admissions as evidence against him. Notably, Doe himself does not argue that we may not consider the admissions. Although Richman testified that a representative of the DA's Office was present at the proffer session, the agreement itself is not signed by any representative of the DA's

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substance of both statements, as well as Doe's motives during each proceeding, and the persuasiveness of his current explanation of his 1993 admission.

In the federal proffer session, Doe gave a detailed account of the activities of fellow Boy Lovers O'Rourke, Bagarozy, and Federowicz, as well as their various "main squeezes" and shared victims. In this context, Doe stated that he had had sex with Edwin, who was also one of O'Rourke's boys, and that the sex "included oral copulation and masturbation" and took place at Doe's apartment in July or August of 1993. He later testified under oath at the Bagarozy trial that all of his statements at the proffer session were true. In contrast, Doe asserted at the hearing that these statements were false, because he had "panicked" when asked about Edwin during the proffer session and had felt compelled to state, untruthfully, that he had had sex with Edwin. The district court found this explanation "somewhat strained," an assessment with which we agree. Prior to being asked about Edwin, Doe detailed his fantasies about various boys in the choir that he led, but was capable of denying attempting to seduce or molest them. Doe also described traveling to Maryland to have sex with young boys and provided graphic details about various sexual encounters with boys, but denied participating, along with other Boy Lovers, in the filming of

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Office, and does not purport to preclude that Office from arguing, as it does, that Doe's admissions during the session should be used against him. *See Pelletier*, 898 F.2d at 302. Moreover, even assuming that the DA's Office was somehow bound by the immunity agreement, the agreement itself allows Doe's statements to be used to rebut any evidence that Doe might offer.

certain boys. Thus, it is evident that Doe admitted extensive criminal conduct but, under the same or similar circumstances, was completely capable of denying certain other criminal acts, and did not feel compelled to implicate himself in a wider range of misconduct.

Edwin's hearing testimony that he never had sex with Doe also does not provide a basis for discounting Doe's 1993 admission of guilt. Because Doe does not dispute that he admitted in 1993 having sex with Edwin, Edwin's testimony that no sex act took place does not explain why Doe would admit the sex act to the authorities even though it had assertedly not actually occurred. For the same reason, Edwin's testimony does not make Doe's explanation that he panicked at the proffer session any more persuasive. Moreover, the potential for Edwin's testimony to corroborate Doe's hearing testimony and render Doe's prior admission of guilt less likely to be true depends on the credibility of Edwin's hearing testimony, and as is discussed below, Edwin's testimony on this issue is not reliable.

Doe had little motive to lie about his contact with Edwin in the proffer session, because the focus of the session was on Doe's knowledge of the other Boy Lovers' activities, and, at the time, Doe was facing a potential prosecution on federal child pornography charges, but not, as far as he knew, on sexual conduct charges. Doe's own conduct with Edwin or any other boys was at most an ancillary issue that, given the wealth of information that he supplied about several other Boy Lovers during the session, would have had little bearing on the authorities' impression of Doe's overall knowledge and potential usefulness as a cooperator. Doe therefore had

no motive to attempt to incriminate himself by asserting falsely that he had had sex with Edwin. Indeed, given that the use immunity provided as an incident to the proffer session would not prevent the authorities from using Doe's statements against him in cross-examination or substantively to rebut his testimony, Doe had no reason to exaggerate his personal criminal conduct.

In contrast, Doe had ample motive to lie at his habeas hearing. Doe failed to file a state collateral challenge to his state conviction or assert his innocence until it appeared that the conviction would adversely affect his federal sentencing. Now he admittedly seeks to avoid the onerous requirements imposed by New York's Sex Offender Registration Act, N.Y. Correct. L. § 168 *et seq.*, by having this felony sodomy conviction vacated. Doe has every reason to maintain that he never had sex with Edwin.[19]

Although this motive to lie might not be sufficient in itself to discredit Doe's hearing testimony, that testimony presents a substantially different account of his involvement with the Boy Lovers and his relationship with Edwin than his testimony at the Bagarozy/Federowicz trial and the 1993 proffer session, leading ineluctably to the conclusion that Doe's hearing testimony is not reliable. At the hearing, Doe repeatedly testified that although he was introduced to Edwin by Edward R., he associated with Edwin not because Edwin

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19. For these reasons, a petitioner's own testimony that he did not commit the crime for which he was convicted, absent some type of corroboration, may rarely constitute reliable evidence of actual innocence.

was one of the Boy Lovers' victims, but because Doe enjoyed taking him—and other boys who happened to be victims of the Boy Lovers—to places they enjoyed. Doe also attempted to distance himself from the Boy Lovers' activities, defining "boy lover" as someone who "prefers to associate" socially with boys, and maintaining that he was not very familiar with Bagarozy or his activities. Specifically, Doe asserted that he was not aware that Bagarozy was actually having sex with Edward R. and other boys, and that he himself had never used Edward R. to meet other potential victims. Thus, Doe attempted to portray his relationship with Edwin as fairly innocent, and to characterize it as only tangentially related to the Boy Lovers by common friends rather than by actual knowledge or a network of shared sex partners.

Doe's hearing testimony stands in stark contrast to his testimony at the Bagarozy/Federowicz trial and his other statements. With respect to his relationship with Edwin, Doe not only admitted at the proffer session to having sex with him, but also stated that Edwin was having sex with Bagarozy and O'Rourke. Moreover, he acknowledged at the Bagarozy trial that he was well aware, by 1993, that Edward R. and his brother were sleeping with Bagarozy, and perhaps other Boy Lovers as well. Thus, Doe's introduction to Edwin did not take place in an innocent context disconnected from the Boy Lovers; rather, it was arranged by a boy through whom Doe and other Boy Lovers had routinely met new victims. These statements are inconsistent with Doe's attempt at the hearing to present his relationship with Edwin as disconnected from the circle of Boy Lovers and their victims.

*Appendix A*

With respect to his connection to the other Boy Lovers, in prior testimony Doe twice defined "boy lover" as someone who has sex with boys who are under the age of consent, demonstrating both his awareness of the circle's activities and his own reason for joining the group. Doe also explicitly defined each Boy Lover's age of preference, leaving no doubt that Doe was aware that he was associating with a circle of pedophiles. Doe stated that in 1984, Doe and Bagarozy both had a sexual relationship with a boy named Tony, and that the two fought over the boy. Finally, Doe asserted that he observed Bagarozy coaching Edward R. on how to deceive investigators in 1991, and that he and Bagarozy took Edward R. to a nude beach in New Jersey. According to his trial testimony, therefore, Doe was both enmeshed in the Boy Lovers' activities and was close friends with Bagarozy, with whom he shared underage sex partners, exchanged child pornography, and discussed methods of seducing young boys.

In sum, a comparison of all of Doe's testimonial statements demonstrates that at the hearing Doe attempted to present his relationship with Edwin in a substantially more innocent light, and himself as substantially less involved with the Boy Lovers, than he had in prior testimony. Because Doe does not argue that he lied at the Bagarozy trial, or at the 1993 proffer session, in any respect other than his admission that he had sex with Edwin, the inconsistencies in his testimony can only reasonably indicate that Doe was attempting to present himself in a favorable light at the hearing. Given the stark discrepancies in the testimony, Doe's blunt admission that he had sex with Edwin before Edwin had even been identified by the state authorities, his obviously extensive knowledge of, and participation in, the Boy Lovers'

activities, and his earlier testimony as to Edwin's involvement in those activities, Doe's hearing testimony is simply not reliable.

In ruling that Doe's testimony was credible in its entirety, the district court clearly erred. First, its failure to weigh the hearing testimony against the 1993 admissions, in the face of the court's recognition that Doe had no persuasive explanation of those admissions, was internally inconsistent. Second, the court failed to consider all of the evidence in the record when it neglected to attempt to reconcile Doe's hearing testimony with his Bagarozy/Federowicz trial testimony, and therefore remained unapprised of Doe's consistent attempt through his hearing testimony to present himself in a flattering light. The court also failed to consider Storino's testimony that Edwin told Doe that he would not give the authorities any incriminating information about Doe, which suggests that the relationship between Edwin and Doe was less than innocent. When Doe's hearing testimony is weighed against his 1993 admissions and other evidence in the record, bearing in mind his probable motives at both proceedings and his evident willingness to bend the truth at the hearing, his hearing testimony cannot be credited as reliable evidence of innocence.

We also find that the district court's discounting of Doe's admission of guilt at his plea allocution was clearly erroneous. The court credited Doe's assertion that he pled guilty only because he was afraid that the DA's Office would bring more serious charges, and because he did not want to endanger his cooperation against Bagarozy and Federowicz. It therefore concluded that Doe decided "to say whatever he

needed to say" in order to plead guilty and secure a sentence of probation. While we have no reason to doubt the sincerity of Doe's explanations of the forces that led him to plead guilty, these explanations are not, viewed in light of the record as a whole, sufficient to support the district court's finding that he falsely allocuted to the crime. Defendants may be reluctant to plead guilty in the absence of clear strategic reasons for so doing not only because they are innocent, but for any number of reasons that have nothing to do with factual innocence, such as their belief that they would fare well at a trial, or their reluctance to be seen as "admitting" guilt. In light of our determination that the 1993 proffer session admissions are reliable, but Doe's hearing testimony that he never had sex with Edwin is not, we find that Doe has not established that he lied under oath at his guilty plea. Doe's plea admission that he had sexual contact with Edwin may therefore be considered as evidence of Doe's guilt. *See Rosario v. United States*, 164 F.3d 729, 734 (2d Cir.1998) (considering petitioners' inculpatory statements made during plea allocution in determining whether no reasonable juror would find petitioners guilty).

**2. Edwin**

Edwin testified that he never had any sexual contact with Doe, and that when asked by Cronin whether Doe had ever made sexual advances toward him, he denied any improprieties and insisted that Doe was simply a "friend figure" and a positive influence. In crediting this testimony, the district court stated that it found Edwin "forthright [and] direct." While this assessment of Edwin's demeanor on the witness stand is uniquely within the province of the district

court, the demeanor finding alone cannot be determinative of the reliability of Edwin's testimony. As discussed above, the actual innocence determination and *Anderson* require the court to consider the substance of the testimony in light of the record as a whole, as well as the witness's demeanor, when deciding whether to credit the witness's account. *See Schlup,* 513 U.S. at 327; *Anderson,* 470 U.S. at 575 (noting that "factors other than demeanor and inflection go into the decision whether or not to believe a witness"). Here, the district court ignored considerable evidence in the record that directly contradicts or undermines Edwin's testimony. For this reason, we find that the court committed clear error in accepting Edwin's version of events, and that Edwin's testimony is not reliable evidence of Doe's actual innocence.

First, Edwin's testimony that Doe never molested him, while consistent with Doe's hearing testimony, is of dubious veracity for much the same reasons as Doe's. Doe himself admitted under oath at his plea allocution that he had had sex with Edwin, and has not provided a credible basis on which to discount that admission. Edwin's testimony must therefore be weighed against Doe's admission and the other evidence in the record. We find that Edwin's testimony conflicts with that evidence in a manner that leads to the conclusion that he was attempting to minimize his involvement with the Boy Lovers at the hearing.

At the hearing, Edwin testified that he knew Bagarozy only slightly, through his participation in a boys' basketball team run by Bagarozy, but that he did not know that Bagarozy was a Boy Lover. Edwin also stated that he knew of O'Rourke, but never had contact with him, and denied

making a habit of spending time with single older men, either alone or in the company of other boys. At the same time, however, Edwin testified that he knew that Angel R. "was O'Rourke's boy," indicating that he had more extensive knowledge of the Boy Lovers than he otherwise admitted. The thrust of Edwin's testimony, therefore, is that he was only tangentially connected to the circle of Boy Lovers, and that he was unaware of the nature of their activities, or even of the men's preference for young boys.

These assertions are belied both by Doe's 1993 statements that O'Rourke and Bagarozy were sexually involved with Edwin, and by Investigator Storino's testimony. Doe testified at the evidentiary hearing that he, O'Rourke, and Edwin had gone to Playland Park in 1994 to discuss the DA's Office's investigation, thus contradicting Edwin's assertion that he never met O'Rourke. Storino also provided evidence of Edwin's close association with Doe and other Boy Lovers by testifying that, in January 1994, before Edwin was interviewed by the DA's Office, Doe informed federal agent Kyle that O'Rourke had met with Edwin and coached him on lying to the authorities. Moreover, Edwin attempted to contact Doe in order to assure him that he would say nothing incriminating. Storino's testimony is corroborated by the notes that he took during his conversation with Agent Kyle, which state that "Edwin [is] reaching out thru Bill O'R[ourke] and others to see [Doe]. Edwin and Edward [R.] spoke with O'R[ourke] and were coached on what to say to thwart the investigation. Edwin is supposedly not going to say anything incrim[inating]. . . . Edwin and Edward [R. are] spending time with O'R[ourke]." This evidence contradicts Edwin's assertions that he had never met O'Rourke, that he

did not realize that Doe and his adult friends were pedophiles, and also strongly suggests that Edwin himself was involved in sexual activities, and therefore had "incriminating" information. Moreover, Edwin's stated desire to inform Doe in particular that he would not divulge anything to the authorities raises the inference that Doe would have reason to fear Edwin's communicating with investigators.[20]

Thus, the bulk of the evidence in the record casts doubt on the veracity of Edwin's testimony as a whole. Storino's testimony and notes, which suggest a particular connection between Doe and Edwin and corroborate Doe's proffer session statement that Edwin was close to O'Rourke, demonstrate that Edwin was attempting to distance himself from the Boy Lovers in the hearing, and that the version of events that he presented was not entirely accurate. The district court, however, ignored this evidence in assessing Edwin's testimony. Given the indications that Edwin lied about the closeness of his relationship with Doe and others, it is impossible to credit Edwin's testimony over the other

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20. It is worth noting that both Storino's testimony on this issue and his notes rest on the hearsay statements of O'Rourke and Kyle. We need not consider whether this evidence would be admissible at a trial, however, because *Schlup* allows us to consider all evidence in the record. *See Schlup*, 513 U.S. at 327. We find Storino's testimony and notes to be reliable, because both O'Rourke's and Doe's statements were against their penal interest, Kyle and Storino are law enforcement professionals who were performing their duties, and Storino contemporaneously recorded the substance of his conversation with Kyle. Moreover, neither party has proffered any evidence to suggest that either Kyle or Storino fabricated the evidence.

evidence, including Doe's own admission, that Doe assaulted Edwin.

Second, Edwin's assertion that he denied being victimized by Doe when interviewed by the DA's Office is contradicted by testimony and by other evidence. Most obviously, ADA Cronin, who conducted the interviews, testified that Edwin detailed two instances of sexual advances by Doe, one of which resulted in actual sexual contact and formed the basis of the sodomy charge. The district court discounted her testimony, however, finding that her "recollection [was] based primarily on her notes," and that Cronin "conceded that she was not sure if the notes were" taken during the interviews. This is a mischaracterization of Cronin's testimony.

Cronin testified that, of seven pages of handwritten notes, four pages were dated March 18, 1994, and were taken during the second interview with Edwin. These are the pages that purport to record Edwin's account of the sexual assault. Of the remaining three pages, Cronin testified that two were taken during the first interview, although they are not dated, and the last page may have been taken while she was preparing for a later proceeding. Thus, the record is clear that the four pages of notes on which Cronin relied for her account of Edwin's accusations were taken during an interview, and the fact that Cronin refreshed her recollection with these notes therefore provides no basis for discounting her testimony. In addition, the district court's assumption that Cronin did not remember her interviews with Edwin because "[t]his case was but one of many sordid situations involving children dealt with by Ms. Cronin" is pure speculation, as

Cronin did not suggest that her memory of the interviews was impaired for any reason, and there was no testimony that Cronin routinely dealt with similar accusations. The district court therefore discounted Cronin's testimony for reasons that are not valid.

Cronin's account of the interviews and Edwin's statement that Doe assaulted him was corroborated in full by the testimony of ADA Bernhard. The district court failed to consider this testimony in substance, however, and made no credibility determination, adverse or otherwise, with respect to Bernhard. Bernhard, who was present at the interviews, testified that he had not reviewed Cronin's notes because he did not need to refresh his recollection, and gave an account of Edwin's accusations and description of his relationship with Doe that is identical to Cronin's testimony and her notes in every respect.

In order to credit Edwin's testimony over Cronin's and Bernhard's, therefore, the factfinder would have to conclude that Cronin and Bernhard were part of a conspiracy to fabricate their account of Edwin's statement and the notes that recorded the statement. The district court explicitly refused to find that Cronin was lying or had fabricated her notes, however, perhaps because there is no evidence in the record that suggests the possibility of prosecutorial misconduct. Yet the court's conclusion that Cronin did not remember the interviews, and might not have taken her notes during the interviews, does not go far enough to explain the inconsistency between her testimony and Edwin's, as crediting Edwin's testimony requires the factfinder to conclude not that Cronin's recollection of what was said at

the interviews differed from Edwin's, but that Cronin affirmatively fabricated the account of the sexual assault that is recorded in her notes. In this respect, the court's findings are internally inconsistent, as the court credited Edwin's testimony in full, but did not make the further finding that Cronin had lied at the hearing and committed misconduct during the prosecution. Furthermore, by ignoring Bernhard's testimony, the district court failed to acknowledge that because Cronin was not the only prosecutor involved in prosecuting Doe, it would have to discredit both prosecutors, and find that a conspiracy existed in the DA's Office in 1994, in order to credit Edwin's account. We find, therefore, that the district court's crediting of Edwin's testimony in light of the clearly contradicting evidence and in light of Doe's 1993 admission and other incriminating statements was clearly erroneous.[21]

We do not hold that prosecutorial misconduct may never be proven absent direct evidence of misconduct or that an alleged victim's statement that he never accused the defendant of wrongdoing is always insufficient to raise an inference of misconduct. Courts observe a presumption that

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21. Our conclusion does not conflict with our holding in *Hemstreet v. Greiner*, 367 F.3d 135 (2d Cir.2004), in which we upheld the district court's finding, on the basis of a sparse record, that agents of the prosecution had threatened a defense witness. *Id.* at 139-40. There, the state did not argue that the misconduct had not occurred, and we therefore found that the district court's inference of misconduct, in the absence of any evidence to the contrary, was not clearly erroneous. *See id.* at 140. Here, of course, the state has presented credible evidence that the employees of the DA's Office acted properly.

prosecutors act properly in furtherance of their duties, *see United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) ("Rather, tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty.") (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion)), but that presumption is of course rebuttable by competent evidence. We simply hold here that Edwin's testimony alone is insufficient, in light of his lack of candor about his involvement with the Boy Lovers and the other evidence that the attack actually occurred, to raise an inference of prosecutorial misconduct.[22]

### B. Application of *Schlup* to Doe's Proffered New Evidence

We find that Doe presented no new reliable evidence of his factual innocence at the March 2003 evidentiary hearing or in his habeas submissions, as is required by *Schlup*. *See Schlup*, 513 U.S. at 324. Because Doe has not presented any new reliable evidence, it is unnecessary to determine whether no reasonable juror would convict in light of Doe's newly proffered evidence.[23]

The district court's crediting of Doe's and Edwin's testimony, and its consequent finding of actual innocence,

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22. For much the same reasons, Edwin's less detailed affidavit, submitted as part of Doe's habeas petition, does not constitute reliable evidence of Doe's innocence.

23. It is worth noting, however, that the evidence of Doe's guilt is overwhelming. Doe admitted guilt twice, at the proffer session and his plea allocution, and Edwin described the assault to Cronin.

resulted in the dilution of *Schlup*'s directives. *Schlup* dictates that the habeas court faced with purported new evidence of a petitioner's actual innocence make its own credibility determinations based on its assessment of the totality of evidence in the record, both "old" and "new." Because *Schlup* also requires that any new evidence of actual innocence be reliable, the habeas court must analyze not only whether the new evidence throws the pre-existing evidence into doubt, but whether the new evidence itself may be considered reliable in light of the pre-existing evidence. Thus, the habeas court may not merely examine the new evidence and, if it believes the new material credible without regard to the pre-existing record, find that the petitioner is actually innocent. That is how the district court proceeded here, and its disregard for the bulk of the evidence in the record allowed it to circumvent *Schlup*'s instruction that the proffered new evidence must be reliable. To allow this mode of analysis would eviscerate the *Schlup* standard.

In light of our conclusion that it is not necessary to apply the *Schlup* "no reasonable juror" standard because Doe has not presented any new reliable evidence, we need not review the district court's application of that standard. The district court's misstatement of the *Schlup* standard in its June 2003 order merits comment, however, in order to clarify our standing instruction to district courts faced with actual innocence claims in the context of AEDPA tolling. *See Whitley*, 317 F.3d at 225-26. The district court stated that *Schlup* requires only that "innocence . . . be demonstrated to be more likely than unlikely," thereby substantially reducing the showing that Doe was required to make in order to establish his actual innocence. This statement of the

standard essentially allowed the district court to act as a jury, determining in the first instance whether Doe had demonstrated by a preponderance of the evidence that he was innocent. Thus, the court concluded that "petitioner has established his innocence by a preponderance of the credible evidence."

As discussed above, however, the *Schlup* standard requires the district court to find, by a preponderance of the evidence, that no reasonable juror would find the petitioner guilty. The preponderance showing is not in itself a high burden of proof, as the district court noted, but the fact that the showing must establish that *no* reasonable juror would convict substantially increases that burden. Even if the court, as one reasonable factfinder, would vote to acquit, the court must step back and consider whether the petitioner's evidentiary showing most likely places a finding of guilt beyond a reasonable doubt outside of the range of potential conclusions that *any* reasonable juror would reach. *See Schlup*, 513 U.S. at 333 (O'Connor, J., concurring). If the court finds that even one juror might reasonably vote to convict, the court must find that the petitioner has failed to establish his actual innocence.

The district court also misapprehended our direction in *Doe I* that the court should "decide as a matter of fact whether Doe has presented a credible claim of actual innocence." *Doe I*, 49 Fed.App. at 342. We later extended this instruction to all district courts faced with claims of actual innocence in the context of AEDPA tolling in *Whitley*, 317 F.3d at 225-26, in which we held that district courts should determine whether a petitioner presents a "credible claim of actual

innocence" before ruling on the legal issue of whether the limitations period could be tolled. The district court understood our reference to a "*credible* claim of actual innocence" to represent a "lesser standard" than that delineated by *Schlup*, and noted that, in its view, Doe had satisfied both the higher *Schlup* standard and the lesser credible claim standard. The reference to a credible claim arises directly from *Schlup* itself, however, which states that "[t]o be credible, [an actual innocence] claim requires petitioner to support his allegations of constitutional error with new reliable evidence." *Schlup*, 513 U.S. at 324. Thus, our instruction in this case, and our extension of that instruction in *Whitley*, do not purport to relax the *Schlup* standard or suggest that the burden of showing of actual innocence is lessened in the equitable tolling context, but simply refer to the fact that any showing of actual innocence must be based on new reliable evidence.

The issue in this case is not one of the relative credibility of witnesses but of reliability of new evidence in light of all the evidence. The actual innocence standard is a demanding one. Failing to account for Doe's conduct inconsistent with his claim of actual innocence, our dissenting colleague would have us overturn the weighty presumptions favoring the veracity of a defendant's sworn plea of guilty and the propriety of prosecutorial conduct. While a recanting victim presents a sympathetic scenario for a claim of actual innocence, we must not flinch from our duty to scrutinize *all* the evidence to assure ourselves of that recantation's reliability. Here, the evidence proffered by Doe fails the strict requirements of *Schlup*.

**C. AEDPA Tolling for Actual Innocence**

In light of our holding, we need not review the district court's conclusion that a credible claim of actual innocence does not toil AEDPA's limitations period. We have previously stated that "[i]n a proper case, we will decide whether constitutional considerations require an actual innocence exception to the AEDPA's statute of limitations." *Whitley,* 317 F.3d at 225. Such a proper case will arise, of course, where a petitioner is able to make a credible showing of actual innocence based on new evidence, thereby demonstrating that equitably tolling the limitations period could prevent a miscarriage of justice. Doe's petition clearly does not present such a case.

It is worth noting, moreover, that the Supreme Court has recently counseled lower courts to avoid extending the actual innocence exception to new contexts if there are "other grounds for cause to excuse the procedural default." *Dretke v. Haley,* 124 S.Ct. 1847, 1852 (2004). The Court's statement that "[b]ecause the various exceptions to the procedural default doctrine are judge-made rules[,] . . . courts as their stewards must exercise restraint, adding to or expanding them only when necessary," *id.* at 1853, counsels restraint in the judge-created area of equitable tolling as well. Thus, in order to avoid "the unhappy effect of prolonging the pendency of federal habeas applications," *id.*, district courts confronted with allegations of actual innocence as a ground for tolling the limitations period should first consider any other grounds for tolling, and only after having ruled out any other possible

means of tolling, consider petitioner's actual innocence claim.[24]

## II. Tolling for Attorney Incompetence

Doe next argues that the limitations period should be tolled between February 1999 and February 2000 because Patrick Wall, the attorney who represented him during that time period, incompetently failed to file Doe's state post-conviction motion.[25] The district court dismissed this argument in its February 2002 order, finding that Wall's alleged incompetence did not rise to the level of extraordinary circumstances necessary to invoke equitable tolling, *see Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir.2001). The court also found that Doe did not exercise reasonable

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24. This is fully consistent with our decision in *Whitley*, which instructs district courts on the manner in which to create a record that is sufficient for this Court to use to determine whether a given petition presents the proper case in which to decide whether actual innocence is a ground for equitable tolling. *See Whitley*, 317 F.3d at 225-26 (laying out questions that district court should investigate with respect to actual innocence claims). We simply hold here that, in accordance with *Haley*, district courts should address the actual innocence question only after fully exploring all other avenues of relief.

25. If the limitations period were tolled during this period, then the clock would have run at least until May 10, 2000, when Doe filed his state post-conviction motion. The filing of that motion would have tolled the limitations period, pursuant to 28 U.S.C. § 2244(d)(2), until November 14, 2001, when the denial of his collateral attack became final. Doe's federal habeas petition, filed on November 30, 2001, after only 189 days had run, would have been timely.

diligence during this period, because he should have realized that Wall was incapable of filing the petition at least ten months before he finally fired him and hired new counsel. We declined to review these conclusions in *Doe I*, and Doe now argues that *Baldayaque v. United States*, 338 F.3d 145 (2d Cir.2003), which clarified that egregious misconduct on the part of an attorney can, in some circumstances, be sufficiently extraordinary to toll the limitations period, dictates that Wall's conduct is sufficient to entitle Doe to tolling. We need not reach this argument, however, because Doe has not established that he acted with reasonable diligence in attempting to file his federal habeas petition during the period that he seeks to toll.

In order to equitably toll AEDPA's limitations period, a petitioner must show that "extraordinary circumstances prevented him from filing his petition on time." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir.2000). This formulation "requires the petitioner to demonstrate a causal relationship between the extraordinary circumstances . . . and the lateness of his filing." *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir.2000). As one component of the causation showing, the petitioner must establish that he diligently pursued his application during the time that he seeks to have tolled. *See id.* at 134. If the petitioner is unable to establish that he diligently attempted to file his petition, the extraordinary circumstances on which his tolling claim is based cannot be said to have caused the lateness of his petition. *See Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir.2001).

Even where the extraordinary circumstances on which the petitioner rests his claim involve attorney incompetence,

the petitioner must still demonstrate that he himself made reasonably diligent attempts to ensure that his petition was filed on time. *See Baldayaque,* 338 F.3d at 153. In other words, the act of retaining an attorney does not absolve the petitioner of his responsibility for overseeing the attorney's conduct or the preparation of the petition. Particularly because petitioners often are fully capable of preparing and filing their habeas petitions *pro se,* and *pro se* status does not in itself constitute an extraordinary circumstance meriting tolling, *see Smith,* 208 F.3d at 18, it would be inequitable to require less diligence from petitioners who are able to hire attorneys than from those who are forced to proceed *pro se.* In the attorney incompetence context, therefore, the reasonable diligence inquiry focuses on the purpose for which the petitioner retained the lawyer, his ability to evaluate the lawyer's performance, his financial and logistical ability to consult other lawyers or obtain new representation, and his ability to comprehend legal materials and file the petition on his own. *See Baldayaque,* 338 F.3d at 153 (listing factors relevant to reasonable diligence that district court should consider on remand).

The district court issued its decision with respect to the attorney incompetence issue before *Baldayaque* was decided, and therefore did not have the opportunity to consider the egregiousness of Wall's conduct in light of *Baldayaque*'s holding that "at some point, an attorney's behavior may be so outrageous or so incompetent as to render it extraordinary." *id.* at 152. The court ruled not only that Wall's conduct was not sufficiently outrageous, but also that Doe was not reasonably diligent. In so doing, the district court nevertheless considered the factors that *Baldayaque* establishes as relevant

to the reasonable diligence determination. After determining that Doe should have been aware of Wall's incompetence as early as April 1999, had both the financial wherewithal to hire another lawyer and his brother's logistical assistance, and could have filed *pro se* at any point, the court concluded that "[t]he facts submitted, viewed most favorably to Petitioner, do not suggest a finding of . . . prevention by . . . misconduct which is at the core of most equitable tolling cases." In light of the district court's consideration of the *Baldayaque* factors, as well as Doe's opportunity to present evidence of his asserted diligence both in his initial submissions to the district court and during the hearing on remand,[26] we find no need to remand to the district court once again to consider Doe's claim in light of *Baldayaque*. Rather, we find that as a matter of law, Doe cannot establish that he acted with reasonable diligence during the period in which he was represented by Wall.

An examination of the circumstances under which Doe hired Wall, the scope of the representation, Doe's instructions to Wall, and Doe's capability of filing his habeas petition himself, indicates that Doe did not exercise reasonable diligence. The district court found, and the record supports, that Doe became interested in collaterally challenging his conviction shortly after he was arrested on federal child pornography charges in November 1998, when he realized

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26. Although the mandate instructed the district court to conduct factfinding as to Doe's reasonable diligence with respect to his actual innocence claim, the court allowed both Doe and his brother to testify at length regarding Wall's incompetence, for the stated purpose of creating a record for our consideration of the attorney competence issue on appeal.

that his second-degree sodomy conviction would mandate a significantly higher sentencing range under the federal Sentencing Guidelines and the relevant child pornography statute. To this end, Doe hired Patrick Wall for the stated purposes of filing a state post-conviction motion pursuant to New York Penal Law § 440.10, and representing Doe with respect to any sentencing issues that might arise in connection with the federal charges.[27]

The evidence demonstrates that the scope of Wall's representation was limited to vacating the sodomy conviction for the purpose of favorably impacting Doe's federal sentencing. After Doe pled guilty to the federal charges on April 9, 1999, his sentencing was initially scheduled for January 7, 2000. Although the AEDPA limitations period was to expire in November 1999, Doe and Wall treated their operative deadline for filing the § 440 motion as January 2000, as Wall promised to have the motion prepared by "New Years' Day 2000." The November 19 expiration of the statute of limitations came and went without notice, apparently, as Doe and his brother made a payment of $10,000 in legal fees to Wall around December 15, 1999. Moreover, Doe's account of his conversations with Wall demonstrates that Doe was concerned only with his sentencing. Wall assured Doe that he would file the § 440 motion well before the sentencing, but neither mentioned the approaching November 19 AEDPA deadline. Even more tellingly, Doe testified that he

27. Doe was once again represented by Murray Richman in connection with his defense of the federal charges, but Richman declined to represent him with respect to the § 440 motion because he would potentially have to testify with respect to Doe's claim that the DA's Office violated his federal immunity agreement.

understood Wall's desire to postpone filing the § 440 motion until they received the federal pre-sentence report as based at least in part on the assumption that if the pre-sentence report did not award criminal history points for the sodomy conviction, it would not be worth filing the § 440 motion at all. The fact that Doe understood this to be Wall's thinking on the issue, and did not correct him or ask him to file the § 440 motion regardless of Doe's federal sentencing outlook, indicates that Doe himself was concerned only about his sentencing, and Wall acted accordingly.

Thus, although Wall might have accomplished the filing of the § 440 motion in time to toll the AEDPA limitations period if not for his alleged incompetence, it cannot be said that Wall's incompetence *prevented* Doe from filing a federal petition or filing the § 440 motion before November 19. Wall was not retained for the purpose of filing a federal habeas petition or exhausting Doe's claims in preparation for the federal petition, and apparently was not instructed to preserve Doe's federal habeas rights. Rather, Doe's focus on his federal sentencing and the goal of avoiding heightened sentencing exposure led him to overlook the expiration of the AEDPA statute of limitations, and to define the scope of his agent's duties accordingly. Given that we expect *pro se* petitioners to know when the limitations period expires and to understand the need to file a state post-conviction motion within that limitations period, *see Smith*, 208 F.3d at 18, such inadvertence on Doe's part cannot constitute reasonable diligence.[28]

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28. Although Doe asserted in his affidavit that he realized that AEDPA provided a "limited time" in which to file his federal habeas

(Cont'd)

Moreover, although Doe testified that in April 1999 he asked Wall to file the § 440 motion as soon as possible, Doe did nothing even as it should have become evident that Wall was not actually working on the motion. During the spring of 1999, Doe, a self-professed lay student of the law, repeatedly asked Wall why it was necessary to wait for the federal pre-sentence report before filing the § 440 motion, but Wall refused to answer him. Given Doe's extensive experience with legal representation and the legal system, this unresponsiveness in the face of a client's questioning should have been ample evidence of Wall's dereliction. Even earlier, however, there were indications that Wall was not actually maintaining a viable law practice, as Wall asked Doe to wire the retainer fee to his wife's bank account, had no proper office, and repeatedly remained unreachable for extended periods of time. Although Doe states that he had no way of knowing about the deterioration of Wall's practice because he was incarcerated, Doe's brother was in constant contact with Wall, and was fully capable of evaluating the status of Wall's practice for himself.

Had Doe been concerned with meeting the AEDPA deadline, he would have realized earlier that Wall's unresponsiveness was jeopardizing his ability to file the § 440 motion in time to toll the AEDPA limitations period.

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(Cont'd)

petition, his interactions with Wall indicate that he was not concerned with the expiration of the limitations period. As discussed below, Doe offers no excuse for his failure, in light of his asserted awareness of the need to file a timely petition, to ensure that his habeas rights were preserved, either by supervising his attorney or by filing *pro se*.

Doe then would have had a number of choices as to how to proceed. *See Villanueva v. United States*, 346 F.3d 55, 63 (2d Cir.2003) (rejecting petitioner's claim that he detrimentally relied on a potential attorney, where petitioner was aware of the AEDPA deadline and capable of taking other steps to meet it). He could have filed a federal habeas petition or the § 440 motion *pro se* at any point during the summer and fall of 1999. As discussed below, the purported inadequacies in the federal prison library should not have prevented Doe from so doing. Doe was obviously fully capable of acting *pro se*, as his personal submissions to the court are well-written, articulate, and clearly the product of someone both fluent in English and highly educated. Doe's testimony in this and other proceedings evidences his legal sophistication, and there is no reason that he could not have harnessed his legal abilities and experience in filing a challenge to his conviction. Alternatively, Doe could have hired another lawyer, as he proved he was capable of doing in February 2000. Doe was at the time represented in connection with the federal charges by Murray Richman, who could have helped him obtain another lawyer, and Doe's brother was clearly willing and able to provide assistance as well.

Doe's exclusive focus on obtaining the most favorable federal sentence possible, and his consequent inattention to the AEDPA deadline and Wall's incompetence, compel the conclusion that he failed to act with reasonable diligence. It is important to note, however, that because the standard is *reasonable* diligence, the amount of diligence required necessarily varies according to the petitioner's abilities and circumstances. *See Baldayaque*, 338 F.3d at 153 (noting that

reasonable diligence is considered in light of the petitioner's circumstances). Despite his incarceration, Doe was in a privileged position relative to most habeas petitioners, as he possessed the education, skills, and financial and logistical ability capably to evaluate his lawyer's performance and act to remedy any problems. In contrast, many prisoners may be forced to rely on incompetent lawyers because their lack of English skills, education, funds, or familiarity with the legal system, as well as their inability to obtain access to other lawyers or sources of assistance, leaves them unable to evaluate their lawyer's performance or hire new counsel. Despite these advantages, Doe did not demonstrate any desire to file the § 440 motion before the AEDPA deadline, did not instruct Wall to preserve his habeas rights, and failed to fire Wall after it became clear that his performance was incompetent.

This failure is inexcusable in light of Doe's abilities, and renders his situation distinguishable from that at issue in *Baldayaque*. There, we found that a remand was warranted to allow the district court to consider whether petitioner had exercised reasonable diligence, on the basis of ample evidence suggesting that Baldayaque had no choice but to rely on his attorney. The evidence indicated that Baldayaque had hired his attorney specifically to file his § 2255 motion, and he and his wife spoke little or no English, had little education, and were incapable of raising the funds necessary to retain another lawyer. *See id.* (suggesting that Baldayaque's difficulties might lead to a finding of reasonable diligence). Although we do not suggest that a petitioner's situation must be as extreme as Baldayaque's in order to demonstrate reasonable diligence, we also do not hold that all petitioners

alleging attorney incompetence should be held to the qualitative standard of reasonable diligence to which we hold Doe.

**III. Tolling for Inadequate Prison Library Materials**

Finally, Doe argues that he was unable to file his § 440 motion *pro se* because he was incarcerated in federal prison during the operative time period, and consequently had no access to New York State case law. Although this Circuit has not yet determined whether the deprivation of access to legal materials can constitute the extraordinary circumstances necessary to toll AEDPA's limitations period, *see Hizbullahankhamon,* 255 F.3d at 75-76, there is no need to address this issue here, because Doe's argument is patently meritless. Doe's § 440 motion was based primarily on federal law, as he argued that the DA's Office withheld *Brady* material, broke its promise not to prosecute him, and coerced his guilty plea, and that he received ineffective assistance of counsel preceding his plea. Doe therefore could have prepared the motion using the federal case law that he concedes was available where he was incarcerated. Moreover, as discussed above, Doe has not proffered any evidence that despite the availability of federal case law, he could not have filed the § 440 motion *pro se,* or suggested that any of the arguments raised in his eventual § 440 motion could not have been raised without relying on New York case law. We therefore affirm the district court's denial of equitable tolling on this theory.

*Appendix A*

## CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED on the grounds stated in this opinion.

POOLER, *dissenting*:

I respectfully dissent because I believe we should affirm the district court's finding that Doe presented a credible claim of actual innocence. This panel should not second guess the trial judge's credibility findings where no compelling extrinsic or other evidence compels a different conclusion. In holding otherwise, the majority supplants the district court's reasoned factual findings with its own speculations and conjectures. More importantly, the majority glosses over the most unusual and disconcerting aspect of this case: here, the alleged victim of a violent sexual assault has come forward and testified that the crime never occurred. It is my view that no reasonable juror, faced with a witness, found highly credible by the district court, who emphatically testifies that he was never victimized, could find beyond a reasonable doubt that the defendant was guilty of that same crime. This is therefore one of the few cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

## I. STANDARD OF REVIEW

In order to demonstrate actual innocence in a collateral proceeding, a petitioner must present "new reliable evidence" that was not presented at trial and show "that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995) (quotation marks omitted). Where the defendant pleaded guilty, the standard nevertheless remains the same. *See Bousley v. United States*, 523 U.S. 614, 623 (1998).

Here, the district court found that Edwin and Doe credibly testified that the crime for which Doe was convicted never occurred. It then found that Doe "exercise[d] reasonable diligence in pursuing his actual innocence claim once he became able to pursue it at all." *Doe v. Menefee*, No. 01 Civ. 10782, slip op. at 22 (S.D.N.Y. June 23, 2003). "In reviewing factual findings, we owe particularly strong deference where the district court premises its findings on credibility determinations." *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir.2004) (*citing Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 64 (2d Cir.1992)) (internal quotation marks omitted); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). The "clearly erroneous" standard, applied to factual determinations made by the district court, is derived from Fed.R.Civ.P. 52(a), which provides, in pertinent part, that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the *credibility of the witnesses*." *Id.* (emphasis added). In *Anderson*, the Supreme Court held that the circuit court overstepped its bounds in finding that the district court's factual conclusions were clearly erroneous. In so holding, the Court reiterated that this standard sets an exceedingly high threshold:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two

> permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

*Anderson,* 470 U.S. at 573-74 (citations omitted). Recognizing the superior position that trial courts occupy in making factual determinations, the Court noted that trial courts are particularly able to assess the credibility of testifying witnesses:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) *demands even greater deference* to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

*Id.* 470 U.S. at 575 (emphasis added, citations omitted).

This circuit has repeatedly relied on *Anderson* in finding that a "district court's factual findings based on the testimony of witnesses are distinctly the province of the district court, and we will not lightly overturn such assessments." *United States v. Beverly,* 5 F.3d 633, 642 (2d Cir.1993) (citations omitted); *see also United States v. Morrison,* 153 F.3d 34, 52 (2d Cir.1998) ("We grant particular deference to the district court when its factual findings are based upon the court's observation of testimony.").

Although the majority notes that, under certain circumstances, this Court has "reversed factual findings where the trial court incorrectly assessed the probative value

of various pieces of evidence[,]" Op. at [32], the circumstances illustrated by these cases do not involve situations where the evidence at issue was witness testimony. Instead, the majority cites to *United States v. Rizzo*, where this Court primarily evaluated documentary evidence before the district court, and the district court's conclusions with respect to this evidence. 349 F.3d 94, 100-02 (2d Cir.2003) (concluding that the district court clearly erred in finding "that the documents used by [the defendant] were obtained through theft[.]"). *Rizzo* did not comment on the reliability or credibility of any testifying witness. Similarly, in *Jiminez v. Mary Washington College*, the Fourth Circuit held that the district court drew unreasonable conclusions with respect to documentary evidence, specifically student evaluations. 57 F.3d 369, 380 (4th Cir.1995). Finally, in *Ortega v. Duncan*, this Court found that the lower court erred in drawing unreasonable conclusions based on testimony which the lower court had found to be credible. 333 F.3d 102, 107 (2d Cir.2003). In so holding, we did not disturb the lower court's finding that the prior testimony of the witness, which was the recantation of a previous statement, was not credible, and in fact, we specifically noted that we gave "deference to [the lower court's] evaluation of the credibility of his recantation." *Id.*

None of the cases cited by the majority involve an appellate court subverting the lower court's assessment of a witness's testimony and I was unable to find any case where this Court refused to abide by a district court's credibility findings. As the following discussion makes clear, the facts of this case are not such that a departure from this established line of cases is warranted.

## II. STANDARD FOR DETERMINING ACTUAL INNOCENCE

### *A. Standard for Determining Actual Innocence*

I agree with the majority that the district court misapprehended the standard for determining actual innocence. Op. at [24]. The district court incorrectly held that it was "satisfied on the totality of the record before [it] that [Doe] has established his innocence by a preponderance of the credible evidence. He has also met the lesser standard mentioned in the mandate, of having presented a credible claim of actual innocence. On the evidence presented, a reasonable juror would have to find a reasonable doubt as to [Doe's] guilt." *Doe*, No. 01 Civ. 10782, at 20. The district court based this conclusion on the erroneous assumption that "[i]nnocence need only be demonstrated to be more likely than unlikely." *Id.* at 5.

Our inquiry, however, is not whether Doe established his innocence by a preponderance, but rather, whether the new evidence, when considered in conjunction with the entire record, establishes that it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327.

### *B. Evidence That Can Be Considered In Determining Actual Innocence*

*Schlup* makes clear that, in assessing actual innocence, the district court must reach its decision in "light of all the evidence, including that alleged to have been illegally

admitted (but with due regard to any unreliability of it and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.)" *Id.* at 328 (quoting Henry Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. CHI. L.REV. 142, 160 (1970)). More recently, however, the Court further specified the type of evidence that should be considered in assessing actual innocence. In its directive to the district court on how to assess an actual innocence claim that may arise on remand, the Supreme Court in *Bousley* stated that "the Government is not limited to the existing record to rebut any [actual innocence] showing that petitioner might make. Rather the Government should be permitted to present any *admissible evidence* of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy." 523 U.S. at 624 (emphasis added); *see also Fountain v. United States,* 357 F.3d 250, 255 (2d Cir.2004) (reciting the *Bousley* "admissible evidence" standard for determining actual innocence in a case involving conspiracy to launder proceeds of wire fraud). Thus, the only evidence that this Court should consider in determining actual innocence is evidence that would have been admissible at trial, and not patently inadmissible evidence such as hearsay testimony or highly prejudicial evidence with little probative value. *See Rosario v. United States,* 164 F.3d 729, 733-34 (2d Cir.1998) (finding that defendant failed to establish actual innocence under *Bousley* because the evidence in the record, minus the hearsay testimony by the confidential informant, established defendant's guilt). The majority dismisses *Bousley*'s directive that a court may consider only admissible evidence as "mere dictum," Op. at [**28**]. While it is true that the Court did not strictly have to reach the evidentiary issue because the actual

innocence claim was not directly before it, we should not ignore such an explicit directive from the highest court. Moreover, a contrary reading would cause an inconsistency with the actual innocence standard, which uses as its benchmark the reasonable juror. This hypothetical juror would plainly not have access to inadmissible evidence. Accordingly, as intimated by *Bousley,* in determining whether the reasonable juror would have found the petitioner to be actually innocent, this Court may not rely on evidence that would have been plainly unavailable to this hypothetical juror. The majority's implicit suggestion that there is a two-step process that neatly separates the evidentiary analysis from the reasonable juror analysis is not supported by case law.

## III. APPLICATION OF LAW TO FACTS

I respectfully find that the majority improperly substituted its own view of the evidence over that of the district court's when it concluded that "the district court's finding that the hearing testimony of Doe and Edwin constitutes reliable evidence of Doe's actual innocence was clearly erroneous." Op. at [32]. Instead, I find that the district court's assessment of Doe's and Edwin's testimony was reasonable, and its "account of the evidence is plausible in light of the record viewed in its entirety." *Anderson,* 470 U.S. at 574. Thus, this Court's reversal of the district court on this issue is not appropriate.

*Appendix A*

*(a) No Physical Evidence Supported The Allegation That Edwin Had Been Assaulted*

The majority disregards the district court's role as the finder-of-facts when it sets aside the lower court's assessment of Edwin's testimony. In discounting his testimony, the majority relies not on solid extrinsic evidence, but instead, on testimony by other witnesses. Such testimony was oftentimes hearsay, conjectural, or directly refuted by other testimony. Thus, the alleged victim's testimony was not contradicted by any extrinsic evidence; instead, the majority chooses to credit the testimony by other witnesses over the testimony by the victim. This choice, however, is not for us to make. As held by the Supreme Court in *Anderson,* "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." 470 U.S. at 575.

Here, there was no forensic evidence or trustworthy eyewitness accounts establishing that Doe had in fact assaulted Edwin. Indeed, there was no admissible evidence that corroborated the testimony by former prosecutors in the Westchester District Attorneys Office ("D.A.'s Office"), aside from handwritten notes created by the prosecutor herself. Therefore, pursuant to *Anderson,* the district court's ruling should not be disturbed unless there is extraordinary evidence that directly undermines the district court's assessment of the victim's testimony. No such evidence exists in this case.

## *Appendix A*

### *(b) Edwin's Testimony*

At the hearing before the district court, Edwin testified that he was 22 years old, worked for Wal-Mart, had one son, and resided in upstate New York (Arkville). Regarding the events at issue, Edwin stated that he never engaged in sexual relations with Doe, forcible or otherwise, and that he was never alone with Doe when he went to see him. He also stated that Doe never refused to take him home or put his hands on him. He testified unequivocally that, although "I was young at the time . . . I knew right from wrong. And I wasn't going to let a man or any other man try to touch me." Tr. at 16. He also testified that he never told investigators from the D.A.'s Office that he had been assaulted by Doe. He said that he told investigators details about Doe's apartment, but that was because he had been inside the apartment on other occasions with his friend Edward and his cousin Abamelay.

On cross examination, Edwin testified that he did not previously know that Doe had a preference for young men. He instead explained that Doe had been a positive role model for him, and wanted him to stay in school and out of trouble.[1]

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1. Question: . . . Your family didn't have a lot of money?

   Edwin: No, sir.

   Question: What did [Doe, Bill O'Rourke, Rich Federowicz] do for you?

   Edwin: They didn't do—they didn't do anything. It wasn't like I went out with them and I—I'm supposed to like let them touch me or anything like that. No. It's just I met them,

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He also responded on cross-examination that Doe never gave him any presents, not even on his birthday.

The district court found Edwin to be

> forthright, direct and responsive in answering the questions posed. No motivation appears from the record that would justify an inference that he was lying. He left the stand with a strong impression on the part of this Court that he was a truthful witness, that he had socialized with [Doe] and some of his friends, but had not personally engaged in any sexual activity with [Doe] or any other man.

*Doe*, No. 01 Civ. 10782, at 10.

This assessment of Edwin's testimony was not clear error. It is without dispute that Edwin had no discernable motive to lie. This is, of course, notwithstanding respondents's best efforts to disparage Edwin's character and motives. Respondents suggested that Edwin was testifying because he was homophobic, and was uncomfortable with the insinuation that he was the victim of a homosexual attack.

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> you know. And ever since I met [Doe], he's been like a . . . friend figure, because he's always . . . cared about like the things I've done, you know. Like he didn't want me to get into no trouble. He wanted me to stay in school.

Tr. at 29.

To this Edwin responded that homosexuality does not bother him, and that his brother was in fact gay. Respondents likewise suggested that Edwin had a lengthy criminal history. However, Edwin's criminal record consisted of a conviction for a domestic dispute, an arrest for not paying the fare when riding the subway, and an arrest for possessing a paint-ball gun. Respondents accused Edwin of testifying out of loyalty to Doe, because in the past Doe had been a friend to him. To this Edwin responded that he did feel loyal to Doe, because "he never did anything wrong to me." Tr. at 30. Finally, Edwin testified that he had not been promised anything nor was he getting any benefit in exchange for his testimony. Instead, he stated simply that "I feel that the truth needs to be told, and I'm going to tell the truth. That's all." Tr. at 52-53.

The majority's rejection of Edwin's testimony rests on an adverse factual inference, contrary to that permissibly drawn by the trial judge. It discredits Edwin's testimony based on its speculation that Edwin misrepresented his relationship with the "Boy Lovers" group and that this relationship was actually a close one. The majority anchors this conclusion solely on the fact that Edwin responded, "yeah" when asked whether he knew that Angel was "Bill O'Rourke's boy?" This answer does not indicate when Edwin first learned of this information or whether he was aware of the implications of his response. Additionally, the majority relies on the fact that investigator Pat Storino testified that he received a telephone call from FBI Agent Kyle on or about February 10th or 12th, 1994 indicating that "Edwin had been reaching out, thr[ough] Bill O'R[ourke] and others, to see [Doe]. Edwin and Edward [R.] spoke with O'R[ourke] and were coached on what to say to thwart the investigation." Op. at

[43]. This factual contention, however, had a great potential to discredit Edwin's testimony. It seems strange that respondents did not directly question Edwin or Doe about this significant issue.

Moreover, the majority admits that "Storino's testimony on this issue and his notes rest on the hearsay statements of O'Rourke and Kyle." Op. at 170 n. 20. Relying on *Schlup*, the majority dismisses this concern, finding that it may properly consider Storino's testimony in assessing Doe's claims of actual innocence. The majority, however, loses sight of the fact that the standard for determining actual innocence is whether a reasonable *juror* would have found it beyond a reasonable doubt that the petitioner was actually innocent. *Schlup*, 513 U.S. at 327. As discussed *supra*, Section II, under *Bousley*, evidence that would be inadmissible at trial should not be considered in an actual innocence determination. Accordingly, since Storino's testimony regarding what O'Rourke told FBI Agent Kyle would not have been admissible, *see* Fed. R. Evid. 802, this court should not use this evidence as a basis for discounting Edwin's testimony.

Finally, a potential to confuse the boys involved was great. There were numerous similarly aged boys involved with the "Boy Lover" group, and one of the main boys' name was Edward R., who was also known as Eddie R., and who lived across the street from Edwin. Coincidentally, both Edwin's and Edward's mother was named Gladys, a fact that took respondents by surprise at the hearing.[2]

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2. Respondents were also confused regarding the identity of other boys. For example, at one point during the hearing, respondents

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I am not convinced that the two events cited by the majority are sufficient to render Edwin's testimony "internally inconsistent." *See Anderson,* 470 U.S. at 575. Accordingly, it is not appropriate for this Court to second guess the trial judge's assessment of Edwin's testimony and to substitute its view of the evidence "as a whole" for that of the lower court's.

*(c) Doe's Testimony*

Doe testified that he did not have any physical or sexual contact with Edwin. He testified that, contrary to Edwin's testimony, he was alone with Edwin once at his apartment and the two were there for less than 10 minutes before they left for an arcade. He testified that, while there, he did not attempt to forcibly have sex with Edwin. The district court observed that "Doe's emphatic denial of guilt in connection with [Edwin] presents a difficult call for this [c]ourt." The court then concluded that Doe's testimony, that he had never assaulted Edwin, "has the ring of truth." *Doe,* No. 01 Civ. 10782, at 19.

The majority disbelieves Doe's protestations of innocence, finding his testimony to be self-serving and lacking in credibility. As support for its position, the majority points to three discrepancies in Doe's testimony. *First,* it

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confused Edwin and Edwin's brother, Xavier. On cross examination, respondents asked Edwin whether he ever represented himself to be Xavier, and Edwin responded: "No. That's my brother." Respondents then asked, "That's your brother?" Edwin replied, "Yes, sir." Tr. at 24.

points to the fact that Doe attempted to minimize his pedophilic tendencies during his testimony before the district court. According to the majority, Doe testified that he socialized with Edwin and other boys merely because he enjoyed doing so, and not because he was sexually involved with them. The majority notes that, although Doe testified that "he was not aware that Bagarozy was actually having sex with Edward R. and other boys," in truth, he was "enmeshed in the Boy Lovers' activities and was close friends with Bagarozy, with whom he shared underage sex partners, exchanged child pornography, and discussed methods of seducing young boys." Op. at [35- 36]. It is, however, without dispute that Doe was a pedophile. The majority's observation that Doe may have been involved with other boys is not evidence that Doe necessarily assaulted Edwin in the summer of 1993, the crime for which he was convicted.

*Second*, the majority contends that Doe's testimony was unreliable because it contravened statements made by him during the September 15, 1993 proffer session. There is, however, some evidence to suggest that Doe may have exaggerated his relationship to Edwin and Edwin's alleged relationships with other "Boy Lovers" during the proffer session. Although the notes memorializing this meeting are extensive, Doe only mentions Edwin in one sentence where he claims to have also had sex with Edwin "at his residence just in the last couple [of] months and the sex included oral copulation and masturbation." Appendix for the Respondent-Appellee ("RA") 267. Significantly, in subsequent federal proffer sessions, Doe was not questioned about Edwin.[3]

3. Although the majority held that there is no indication in the record of what Doe stated in the October proffer session, *see* Op. at

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*See* Laura Kaplan Aff. ¶ 5 (June 8, 2000) ("[a]t no time during the October 4, 1993 proffer session did the defendant discuss his relationship with Edwin [ ]."); *see also* James A. Kyle Aff. ¶ 6 (June 16, 2000) (the Oct. 4, 1993 proffer session "did not include any discussion of any relationship between [Doe] and a boy named 'Edwin.'").

Moreover, even though Doe supposedly claimed at the September 15, 1993 proffer session that there were rumors that Edwin was having sex with O'Rourke, and that Edwin was also "one of Richard Bagarozy's 'main boys,'" RA 267. Laura J. Kaplan, the assistant United States Attorney ("AUSA") for the District of New Jersey who was the lead prosecutor in the Bagarozy/Federowicz case, acknowledged that "Edwin . . . was not one of the children involved in the case being investigated as part of the Bagarozy/Federowicz case." Kaplan Aff. ¶ 5 (June 8, 2000). Further, Edwin was not mentioned in Doe's testimony in the Bargarozy trial even though Doe discussed several boys that he, Bagarozy and Federowicz had assaulted. Thus, the fact that Edwin was never again mentioned, aside from the one mention at the first proffer session, indicates that the prosecution found Doe's initial assertions regarding his relationship with Edwin, and Edwin's relationship with other Boy Lovers, to be tenuous. Thus, it is equally plausible that Doe exaggerated his relationship with Edwin at the initial proffer session in order to gain the benefits of cooperation.

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[9 n.8], affidavits submitted by AUSA Laura Kaplan and investigator Kyle clearly indicate that Edwin was not discussed at the second proffer session.

The majority further argues that Doe's proffer statements must have been truthful because Doe had no motive to lie about having sex with Edwin. The focus of this meeting was to ascertain Doe's knowledge of the other Boy Lovers's activities. Doe's personal conduct "was at most an ancillary issue." Op. at 167. The majority concludes that Doe must have mentioned having sex with Edwin because it was true. The majority's speculation regarding Doe's supposed motive for discussing Edwin is dubious. There is no evidence to suggest that Doe did not feel the need to implicate himself. To the contrary, notes from the proffer session were replete with self-incriminating information, such as Doe's statement that he paid two young boys to pose naked for photographs, that he traveled to Baltimore, Maryland in 1989 and 1990 to engage in sex with young boys, and that he took boys to a certain hotel frequented by Boy Lovers. Indeed, it is equally likely that he mentioned these events as an attempt to exaggerate his experience as a Boy Lover, which thereby increased his usefulness to the prosecution, rather than volunteered information because of some desire to confess all of his past deeds.

*Third,* the majority contends that Doe's testimony was unreliable because it contravened statements made by him during his guilty plea allocution in February 1995. The fact that Doe admitted to sodomizing Edwin in order to obtain the benefits of a plea bargain is not conclusive evidence of guilt. The district court correctly acknowledged that, in the real world, "people yield their honor and principles to overwhelming force and will say, even under oath, what satisfies their instinct for survival." *Doe,* No. 01 Civ. 10782, at 17. As noted by the district court, in this case, if Doe

accepted the plea, he would have been sentenced to a non-custodial sentence of probation. On the other hand, if he did not accept the plea, or if his plea was rejected for failure to allocute, he could not testify in the federal Newark case and he would have been charged and tried in Westchester for the more serious charge of forcible sodomy, a Class B violent felony, which would subject him to a prison sentence of up to 25 years. The likelihood that he would be convicted if he failed to plead was great. He was allegedly informed by Elizabeth Cronin[4] that she had a written statement from the victim and that the victim intended to testify against him. Murray Richman, Doe's attorney during these events, testified that Cronin "definitely" represented to him that she had a signed statement from the alleged victim. Tr. at 18-19. Cronin denies that this representation was made. Further, Richman most likely informed Doe that a child's testimony regarding a sexual assault can be devastating and irrebutable. Further, individuals convicted of child molestation have a difficult time in prison. Thus, as found by the district court, "[f]aced with the alternatives known to him, and as might be

4. Elizabeth Cronin is currently the Director of Legal Affairs for our Court of Appeals. In my memorandum of December 22, 2003 to the Special Committee on Conflicts, I expressed my unease over this Court's retention of jurisdiction over this case because, in considering Doe's petition, we are required to rule on the propriety of past prosecutorial conduct by Cronin, a senior member of our staff. RSP MEM. (Dec. 22, 2003); Op. at [45-46]. We are also required to assess the credibility of her recent testimony regarding these events before the district court. These circumstances may appear to create a conflict of interest. The committee considered at length these concerns and concluded that the conflict was not so severe as to necessitate our recusal. REPORT OF THE AD HOC COMMITTEE ON CONSIDERATION of *Doe v. Menefee* No. 03-2432 (Feb. 4, 2004).

expected, [Doe] decided to accept the highly favorable plea bargain and to say whatever he needed to say in order to do so." *Doe,* No. 01 Civ. 10782, at 18.

Moreover, Doe persuasively argues that AUSA Kaplan pressured him to take the plea. Doe testified that he informed Kaplan that he was adverse to the idea of pleading guilty because, "not only hadn't I committed the underlying crime, but I have never in my life done anything like take somebody and throw them down on a bed or have any violent connection with them involving . . . sex, ever." Tr. at 124. He claims that AUSA Kaplan responded, "You have a problem. You told them in the federal proffer that you had had some contact, and you, in that case, will have to either go back to that or you will have to take the Fifth Amendment on the stand. If you take the Fifth Amendment on the witness stand during my trial . . . I will not be a happy camper." Tr. at 124. Thus, based on these considerations, Doe entered the plea on February 6, 1995, one day before he was originally scheduled to testify in the federal case. Accordingly, the district court's decision to credit Doe's testimony was not so unreasonable that this Court is compelled to reverse.

*(d) The Respondents's Case*

The majority holds that it was patently unreasonable for the district court to have credited Edwin's and Doe's testimony because their testimony was contradicted by the testimony of former employees of the D.A.'s Office, Elizabeth Cronin, Greg Bernhard, and Pat Storino. There are, however, four reasons why this evidence was not so compelling that the district court's decision to credit Edwin's and Doe's testimony was not clear error.

*Appendix A*

*First,* the D.A.'s Office's case against Doe was poorly developed. The only evidence supporting Doe's guilty plea, aside from Doe's own statements, was the recollection of members of the D.A.'s office regarding what a 12-year-old boy had told them during one or two interviews. Cronin's interview with Edwin was not tape recorded or otherwise memorialized except for her handwritten notes. Further, the same alleged victim now testifies that he never made these statements to investigators and that the underlying crime never occurred. Thus, this is certainly not the case where the district court, in choosing to credit the victim's testimony, turned its back on a wealth of damming evidence.

*Second,* when Cronin prosecuted this case, she had not sufficiently corroborated Edwin's alleged statement that he had been assaulted by Doe. On direct examination, she was asked whether she took any steps to corroborate the details of what Edwin told her. She responded that Edwin had also given her information such as "what [Doe's] apartment looked like, what [his] car looked like, and . . . what [Doe] looked like." Tr. at 157. These facts, however, establish very little. It is without question that Edwin was familiar with Doe and had been inside his car and apartment on several occasions. The fact that Edwin knew what Doe looked like hardly establishes the issue of whether Doe sexually assaulted him.

On cross-examination, when again asked "what other independent evidence did you have at the time to substantiate or corroborate the statements of Edwin," Cronin responded "Well, I wouldn't have had to corroborate his statements, because he was old enough to testify." Tr. at 182. She then

responded that, aside from Edwin's description of Doe, Doe's apartment, and Doe's car, she had wiretaps of conversations by "men in this group about Edwin." Tr. at 183. Significantly, the wire tap evidence primarily consisted of conversations by other individuals involving what Doe had said, or what they speculated was Doe's relationship with Edwin. Again, much of this evidence consisted of hearsay testimony that would not have been admissible at trial. Thus, a reasonable juror could not consider this evidence in evaluating Doe's claim of actual innocence.

As a final matter, certain aspects of Cronin's testimony regarding what Edwin allegedly told her during the two interviews are inconsistent. She claims that Edwin told her that he had been violently assaulted by Doe on two occasions at his apartment. The first time, Doe forcibly threw Edwin onto his bed, Edwin allegedly struggled against him, and shouted "I want to go, I want to go." Tr. at 151-53. Doe responded, "You have no other way to get home, because I brought you here." *Id.* at 153. Approximately one or two months later, Edwin returned to Doe's apartment. On this second occasion, Doe supposedly attacked Edwin again, and this time, put his mouth on Edwin's penis. It is unclear, however, why Edwin would return to Doe's apartment or even continue associating with Doe after the first violent attack occurred. Indeed, even after the second attack, Edwin continued to go to places with Doe such as the arcade. When asked on cross-examination whether Cronin thought it was odd that, after Edwin had been violently attacked, he would continue to meet with Doe, Cronin responded, "I wouldn't say I considered it odd, but I did consider it something that I needed to talk to him about." Tr. at 183.

*Third,* the time line of the alleged events is also suspicious. Cronin testified that Edwin met Doe "sometime in May [1993], and then the sexual stuff didn't actually happen until July or August." Tr. at 185. Edwin's introduction to Doe in May 1993 was corroborated by Cronin's notes. Thus, Edwin had associated with Doe for a short amount of time before the alleged assault occurred. Moreover, during July and early August of 1993, Doe was traveling with his chorus group in Europe, a fact attested to in the Bagarozy/ Federowicz trial in 1995, and again at the 2003 hearing before the district court. This unappreciated fact has two serious implications: First, prior to the alleged assaults, Edwin had not associated with Doe for a continuous four-month period. Given the brief amount of time that Edwin had known Doe, it seems unlikely that Edwin would have developed such a strong sense of loyalty or comfort level with Doe that he would have returned to Doe's apartment soon after he was initially attacked, would meet with Doe at an arcade after the second attack, and then would lie on the witness stand for Doe several years later. Second, and more importantly, the fact that Doe was away from New York in July and early August of 1993 is concerning because he plead guilty to assaulting Edwin "on or about and between July 1st of 1993 and August 13th of 1993." Op. at [11]. Thus, the fact that Doe may have been out of the country when the alleged attacks occurred further supports Doe's claims of innocence.

*Fourth,* the district court simply did not find Cronin's testimony to be credible. It stated:

> Without making any adverse credibility finding (as requested by [Doe] ) I conclude that where

> [Edwin's] testimony differs as to material facts, his version is entitled to greater weight.

*Doe,* No. 01 Civ. 10782, at 11. While the majority discounts Doe's testimony as self-serving, at the same time, it ignores the fact that Cronin's testimony was likewise tinged with self-interest. Doe accuses Cronin of committing misconduct in the prosecution of his case. He claims that she actively misled his attorney into believing that there was a signed victim's statement when there was none. He also claims that the D.A.'s Office made assurances that if he cooperated with Westchester and federal law enforcement agents, he would not be prosecuted by the D.A.'s Office. Cronin therefore had an incentive to defend the choices that she made while prosecuting this case. Because her testimony could likewise be viewed as self-serving, it is not for this Court to decide which testimony is more believable on this basis.

The district court further found that this "case was but one of many sordid situations involving children dealt with by Ms. Cronin during her lengthy public service in the office of the District Attorney. Her recollection is based primarily on her notes, at least some of which are not contemporaneous records." *Id.* The majority dismisses this observation as "pure speculation," although it admits that only four out of seven pages of notes were dated. Op. at [44-45]. It contends that "there was no testimony that Cronin routinely dealt with similar accusations." Op. at [45]. Cronin, however, testified that she was employed at the D.A.'s Office for 14 years, and for 12 of those years, she was assigned to the "Special

Prosecutions Division." She describes her position as the "Assistant D.A. in that office handling domestic child abuse cases." Accordingly, because it is clear that she routinely dealt with child abuse cases, the majority's discounting of the district court's view of Cronin's testimony on this basis was likewise improper.

The majority further suggests that the district court erred in failing to acknowledge the fact that Cronin's testimony was "corroborated in full by the testimony of ADA Bernhard." Op. at [45-46]. There was, however, a seeming discrepancy between Cronin's and Bernhard's testimony. Bernhard, who was present at Cronin's interviews with Edwin, testified about a single assault, while according to Cronin's testimony and her notes, Edwin was allegedly assaulted twice. When asked on direct examination whether Bernhard remembered "how the coerced aspect of the conduct first came to be?" he responded that Edwin told him and Cronin that Doe took Edwin to his apartment, began "grabbing at [Edwin's] legs . . . [and that Doe] eventually pulled [Edwin] off of the chair and threw him on a bed and pulled down his pants and put his mouth on Edwin's penis." Tr. at 198-99. The majority attempts to explain this discrepancy by stating that "Bernhard was asked only about Edwin's second visit to the apartment, from which the sodomy charge arose." Op. at [20 n.14]. This characterization of the question posed to Bernhard is inaccurate. Bernhard first discussed the assault, and then a few questions later, respondents returned to this line of questioning and made clear that Bernard was describing the

second attack.[5] Unfortunately, neither party sought to clarify this ambiguity.

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5. Question: Okay. Do you remember how the coerced aspect of the conduct first came to be? Was it suggested by you or Ms. Cronin or stated by the boy for the first time?

Bernhard: It was Edwin.

Question: He stated it himself, before—

Bernhard: He didn't use the word force. But Edwin was the one who was telling us that [Doe] invited him into his apartment to use a computer game, and that, while he was on the computer, [Doe] was grabbing at his legs and trying to turn him away from the computer game, and that he eventually pulled him off of the chair and threw him on a bed and pulled down his pants and put his mouth on Edwin's penis.

Question: Okay. For clarification's sake, is it true that you're basing your testimony here today on a combination of your own recollection and your review of notes prepared that you understand to be prepared by Ms. Cronin?

. . .

Question: So, in essence, just tell us what you understand—you recall Edwin to have said in regard to the second time that he went to [Doe's apartment]?

Bernhard: That he, in fact, was invited up to use the video game, to see a computer game,

(Cont'd)

* * *

I conclude that the district court did not err in crediting Edwin's and Doe's testimony. Adopting the district court's credibility findings, I find that Doe has presented new reliable evidence of actual innocence and that it is more likely than not "that no reasonable juror would have found [Doe] guilty." *Schlup*, 513 U.S. at 329. No reasonable juror would have found Doe guilty beyond a reasonable doubt where Edwin, the alleged victim, credibly testified that no criminal act occurred, and no damning, physical evidence or eyewitness testimony exists to contradict this testimony.

## IV. AEDPA TOLLING

Had I been able to convince the majority that this case presented a credible claim of actual innocence, this panel would then have taken up the issue of whether AEDPA's one year statute of limitations is tolled. Because the majority does not agree that this case does present a credible claim of actual innocence, I decline to consider that issue as a panel of one, as tempting as that opportunity may be, and leave for another day the resolution of this difficult issue.

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(Cont'd)

> actually, and that [Doe] kept grabbing him, and he told him to cut it out, "Stop grabbing my leg." . . . that [Doe] put his mouth on his penis after [Doe] pulled [Edwin's] pants down.

Tr. at 198-99.

*Appendix A*

## V. ATTORNEY INCOMPETENCE

I do not dispute the majority's affirmance of the district court's conclusions with respect to the attorney incompetence issue. For the reasons stated by the majority, I likewise find that Doe did not exercise reasonable diligence during the period he seeks to toll.

## CONCLUSION

While there are conflicts between Doe's and Edwin's testimony on one hand, and Cronin's, Storino's, and Bernard's testimony on the other, I believe the district court did not clearly err in finding Doe's and Edward's testimony to be more credible. It is inappropriate in all but the most extraordinary cases for this Court to second-guess a district court's credibility findings. Nothing in the record convinces me that Cronin's, Bernhard's and Storino's testimony was irrefutably more credible. The majority's dissection of the district court's decision departs from our precedents and wrongly supplants the lower court's assessment of the evidence with its own factual inferences, never having seen or heard any of the testimony that it now seeks to discredit. Edwin's testimony was not so inconsistent with other evidence in the record that this Court is compelled to discredit it. Accordingly, I must dissent.

## APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 22, 2004

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 22nd day of April, two thousand and four,

Present:

Hon. Thomas J. Meskill,
Hon. Rosemary S. Pooler,
Hon. Sonia Sotomayor,
*Circuit Judges,*

Docket No.: 03-2432

JOHN DOE,

Plaintiff-Appellant,

v.

FREDERICK MENEFEE, Warden of the Otisville Federal Correctional Institution; THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants-Appellees.

*Appendix B*

The parties are directed to address the following questions in the form of letter briefing. Answers to these questions should be no more than 5 single-spaced pages in total. Appellant's answers should be received by the clerk's office on or before 5 p.m. on Monday, May 3, 2004. Appellee's answers should be received on or before 5 p.m. on Monday, May 17, 2004.

1. Given that Doe's Criminal convictions are a matter of public record and the habeas proceedings below were public, it is appropriate or useful to allow Doe to maintain this appeal under a pseudonym?

2. What are the public and private interests that militate for or against maintaining the pseudonym?

FOR THE COURT:
Roseanne B. MacKechnie, Clerk

By: s/ Lucille Carr

## APPENDIX C — FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 23, 2003

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

01 Civ. 10782 (CLB)

JOHN DOE,

Petitioner,

- against -

FREDERICK MENEFEE, Warden, et al.,

Respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND**

*Brieant, J.*

By his counseled Petition filed under seal in this Court on November 30, 2001, Mr. John Doe[1] seeks pursuant to 28 U.S.C.

1. The Petitioner's Counsel received leave to file under seal, by order of the Part 1 Judge dated November 30, 2001. That Order was modified on December 28, 2001 to permit Petitioner to continue to litigate under the pseudonym of John Doe and to redact his true name from any documents attached to pleadings but all papers filed after that date are to be public.

§ 2254 to vacate a judgment of conviction of the Westchester County Court, based on his plea of guilty to a state felony of Sodomy in the Second Degree entered January 16, 1996.

At the time that the Petition was filed, Petitioner was serving a federal sentence imposed in the Eastern District of New York which has since expired, and is presently on supervised release under that sentence. At the time that the Petition was filed, Westchester County had on file a Detainer and Probation Violation Warrant with the Federal Bureau of Prisons in connection with a charge of violation of probation imposed on the state conviction. Since that time, Westchester County has withdrawn its detainer and the state probation has expired. However, Petitioner was in State custody as a matter of law, because of the detainer, as of the date when the Petition was filed and, therefore, this Court had and continues to have subject matter jurisdiction of these proceedings.

This Court filed a Memorandum Decision and Order dated February 21, 2002 finding that the Petition was time-barred and the totality of the facts presented did not, as a matter of law, rise to the level required for equitable tolling of the statute of limitations under AEDPA. Accordingly, the Petition was dismissed and a final judgment entered. Because significant legal issues are presented including a claim of factual innocence, this Court issued a Certificate of Appealability.

On appeal, a Summary Order was issued on October 22, 2002 vacating the judgment of the District Court and remanding the case for further proceedings. Familiarity with that unpublished Order (found at *Doe v. Menefee*, 49 Fed. Appx. 340 (2d Cir. 2002) on the part of the reader is assumed.

In that decision, the Court of Appeals held:

> "We have not yet determined whether the 'Constitution requires an actual innocence' exception to [the Anti-Terrorist and Effective Death Penalty Act's] statute of limitations". *Lucidore v. New York State Division of Parole,* 209 F.3d 107, 114 (2d Cir.) *cert. denied* 531 U.S. 873 (2000). We have, however, held that in order to show actual innocence "a petitioner must present 'new reliable evidence that was not presented at trial' and show that it is more likely than not that no reasonable juror [would have found him] guilty beyond a reasonable doubt"' *Id.* (quoting *Schlup v. Delo,* 513 U.S. 298, 299, 327-28 (1995)). In this case, Doe has presented evidence, the affidavit of alleged victim, which might well lead a reasonable juror to find him not guilty. However, the respondent also has presented extensive evidence undermining the victim's affidavit. In addition to Doe's detailed guilty plea, this evidence includes contemporaneous notes by the Assistant District Attorney who interviewed [the victim]. Moreover, [the victim's] claims have not been tested by cross-examination.
>
> * * * *
>
> "In a proper case, we will decide whether constitutional considerations require an actual innocence exception to AEDPA's statute of limitations, but we do not know, on the basis of the record in hand, whether this case compels us to do so. See *Wyzykowski v. Dep't. of Corrs.,* 226 F.3d

1213, 1218 (11th Cir, 2000). ("The factual issue of whether the Petitioner can make a showing of actual innocence should be first addressed, before addressing the constitutional issue of whether the Suspension Clause requires such an exception for actual innocence.") Therefore, we vacate the district court's judgment and remand for the district court to decided, as a matter of fact, whether Doe has presented a credible claim of actual innocence."

In the course of addressing questions that bear upon Doe's claim of actual innocence, the district court is directed to consider whether a petitioner asserting actual innocence must demonstrate that he was reasonably diligent in pursuing that claim. The district court found that Doe failed to exercise reasonable diligence by relying on his negligent attorney to bring his Section 440.10 motion. The Court should now determine whether Doe exercised reasonable diligence in pursuing his actual innocence claim.

The Court of Appeals declined to consider the Appellant's argument that his attorney's failure to file timely rose to the level of extraordinary circumstances required for equitable tolling, nor his argument concerning the adequacy of the prison library. After its unreported decision in this case, the Court of Appeals, on January 17, 2003, decided *Whitley v. Senkowski*, 317 F.3d 223, 225 (2d Cir. 2003) in which it held in reliance on *Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997), a case involving proceedings under 28 U.S.C. § 2255 by a federal prisoner, that the constitutionality of AEDPA's statute of limitations, if applied to a claim of actual innocence, is an open

question today and that it remains so. The Court in *Whitley* went on to hold that:

> "In a proper case, we will decide whether constitutional considerations require an actual innocence exception to the AEDPA's statute of limitations. This, however, is not yet, and may never be, that case since we do not know, on the basis of the record before us, whether the unsettled question needs to be reached in order to decide the case."

Citing its unpublished opinion in *Doe v. Menefee,* the Court remanded the *Whitley case* "for the district court to decide, as a matter of fact, whether Whitley has presented a credible claim of actual innocence."

Following other proceedings on remand, not material to this decision, this Court, having obtained the presence of the Petitioner by issuance of a *writ ad prosequendam,* held an evidentiary hearing commencing on March 14, 2003 and continuing thereafter, on March 17 and 18, 2003. The post hearing submissions of counsel for the parties have been received and the matter fully submitted for decision on June 17, 2003.

I

***Standard of Proof***

Almost ten years have expired since the events leading to Doe's conviction on his plea of guilty of the felony of sodomy in the second degree. The accusation was that the crime had been committed in the period between July 1 and August 13, 1993.

*Appendix C*

It requires more than a slight amount of judicial self-assurance for a reviewing federal court in *habeas corpus* to attempt to adjudicate factual innocence after a lapse of ten years. The most that can be said of such an exercise is that it implicates the clash of presumptions. The remand demands no more than a determination, not that Doe is in truth and in fact innocent of the specific charge, but that he "has presented a credible claim of factual innocence". The presumption of innocence is the strongest presumption known to the law, *United States v. Matthews*, 787 F. 2d 38, 43 (2d Cir. 1986). Like unto it but less forceful are the presumptions of regularity with which the proceedings of the state court and the state prosecutor's office are clothed, and the presumption of truthfulness which attaches to the testimony of a defendant given at his plea allocution, and by a witness in this Court. Perhaps, surprisingly and fortunately for a court charged with such a daunting mission, the standard of proof is at the lowest possible level. Innocence need only be demonstrated to be more likely than unlikely. *Murray v. Carrier*, 477 U.S. 478, (1986) as construed in *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

***Evidence Presented to this Court on Remand***

As our Court of Appeals noted in its prior decision in this matter, "Doe has presented evidence, the affidavit of his alleged victim, which might well lead a reasonable juror to find him not guilty". We begin our analysis of the evidence with the testimony of the alleged victim.

As noted above, the charge of sodomy was indefinite as to the date or time (July 1 through August 13, 1993). The site of the crime was said to be the Petitioner's apartment in Tarrytown where Petitioner resided alone. In connection with the plea

allocution, the Prosecutor announced that "the information we had is that there was another incident involving the same teenager [which is] covered by the plea." (Tr. at 6) No evidence concerning this other incident was given at the hearing before this Court, or anywhere.

The victim testified before me on March 17, 2003 using the name Edwin Escalera. He was known originally to the Prosecution as Hernandez. Escalera testified that he was born February 24, 1981, making him age 12 at the time of the claimed incident and age 22 at the time of his testimony before this Court. Escalera testified that he was currently employed with a chain store and has a son. He identified Petitioner in open court and stated that he met him at 183rd Street and the Grand Concourse in the Bronx approximately ten years ago. Escalera admitted that he met the Petitioner through a cousin and a friend in the same age group and that he, his cousin Abamelay, and the other child, Edward, went with Petitioner to Sportsworld and to Video Games and restaurants as part of a group including boys and male adults. These groups always met in public places and Escalera said there were no times when he was alone with the Petitioner. (Tr. at 8) He was at the home of Petitioner only once and was not alone then but was accompanied by his cousin and the other child, Edward. Escalera's relationship with the Petitioner was known to his mother and his brothers. He testified that he never had sexual contact or relations with the Petitioner, and that neither Edward nor his cousin Abamelay, to his knowledge, did so and denied that the Petitioner ever attempted forcibly to have sexual contact with him.

That Doe during the relevant times was a pedophile seems not to be disputed. He consorted with other men of similar

proclivities who disdained payment of teenage male prostitutes but instead engaged in elaborate patterns of friendship and confidence building activities ultimately leading to seduction. These activities included group recreation and sports engaged in simultaneously with several boys. Not all became lovers. The courting game was enjoyable in itself. Doe does not deny doing these things; he only disputes the charge of conviction.

Former Assistant District Attorney Greg Bernhard testified at the hearing before this Court. He supervised a Court ordered wiretap affecting various telephones including the telephones of Richard Bagarozy, discussed below, and Petitioner. One of the conversations intercepted was between Bagarozy and William O'Rourke in which they discussed, in the absence of Petitioner, that Petitioner had paid a young man named Edwin for sex. There was also a conversation between Petitioner and Bagarozy in which it was mentioned that Edwin was planning to go on a camping trip with O'Rourke and Bagarozy,

Escalera admitted that he was contacted by Westchester County prosecutorial authorities in 1993 and that he and his mother were picked up at their home in the Bronx by District Attorneys' office investigators and brought to White Plains to be questioned about Petitioner. Upon arrival at White Plains, Escalera was separated from his mother and taken to an interview room where "they started asking me questions about Mr. [Doe]." (Tr. at 13) He described the interviewer as a lady and said that he was alone with her.

*Appendix C*

Escalera testified:

> Q. Now, to the best of your ability, can you please describe for the Court, what took place during that interview?
>
> A. Yes. They took me in a room and they started asking me questions about Mr. [Doe]. And I answered them to the best that I can. And, you know, like asking me like has he ever touched me, ever put his hands on me and all of that. And I told them no, That never happened. If it would have happened, I would have told my parents. I would have told somebody. I could have done something about it.

The interviewer asked Escalera to describe the layout of the Tarrytown apartment, which he did. He told them he had been there with two other persons.

Escalera described the Assistant District Attorney as having "presented herself to me as a detective" and that she interviewed him alone but towards the end of the interview "a guy came in". Escalera testified that he was asked if Petitioner ever gave him money for sexual favors or anything like that and told her "no, that did not happen" and told her that he was only with Doe as part of a group. She told him that "someone they had previously interviewed had told them that Mr. [Doe] was touching me" (Tr. at 16) and he denied that was true. The witness testified that if it had happened "I would have said something to somebody. Yeah, I was young at the time, but I know -- at the

time, I knew right from wrong and I wasn't going to let a man or any other man try to touch me". (Tr. at 16).

Escalera testified he was interviewed only once in Westchester County. The testimony of Elizabeth Cronin, the Assistant District Attorney who interviewed Escalera, is to the effect that Escalera was brought to White Plains for interviewing on *two* occasions. This would be the ordinary practice in dealing with a victim of child abuse. Patrick Storino, an Investigator for the District Attorney testified he brought Escalera to the office only once.[2] Escalera testified he was never interviewed by a social worker or by Probation and that he never signed a statement of any kind and that he had never told his mother he had been sexually assaulted.

Escalera testified that subsequently when he was incarcerated in Rikers Island as a result of a domestic dispute with a girlfriend in 1998 or 1999, "I bumped into a friend that I knew, and -- that knows Mr. [Doe] and he told me that Mr. [Doe] was in jail because of me"[3] Upon being released from Rikers Island, Escalera telephoned Doe, who told him that he could not speak with him because of the Order of Protection issued by the Westchester County Court in connection with his sentence of Probation. A few weeks later, Petitioner's private investigator came to Escalera's home in New Jersey and the witness testified

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2. Assistant District Attorney Greg Bernhard testified there were two interviews, however, he refreshed his recollection by reference to Ms. Cronin's file.

3. It was a youth named Angel, who consorted with O'Rourke (see *infra*), knew Doe, and met Escalera in Rikers Island who told him Doe was in jail because of Escalera.

that he told the investigator exactly what he had told this Court during the hearing. Thereafter, he went to Petitioner's lawyer's office for an interview and signed an affidavit in April 2000 which is part of the record of this proceeding. At that time, he was represented by an attorney. Escalera claimed he did not know who paid the attorney. It was Doe who retained and paid the lawyer, ostensibly to protect Escalera from possible pressure or intimidation on the part of the state prosecutors.

Cross-examination followed. The witness conceded on cross-examination that he had played, as a part of a basketball team, sponsored by Bill O'Rourke, a person who consorted with young boys, and that he also knew Richard Bagarozy, defendant in the Newark federal case discussed below, who had a basketball team. The witness described Petitioner as a "friend figure" who didn't want him to get into trouble and wanted him to stay in school (Tr. at 29).

There was nothing about the cross-examination to shake Escalera's credibility. He adhered to his testimony that he only went to the District Attorney's office once, and confirmed that he had given detailed answers during his interview, particularly with respect to the layout of the apartment. He conceded on cross-examination that he had been arrested and served jail time for subway fare evasion, and again for a domestic dispute with the mother of his child, and that he was also arrested in New Jersey in 1999 for damage to a house caused with a paintball gun. He denied twice in cross-examination that he was ever called back for a second interview with the District Attorney's office.

The Court's observation of the witness Escalera is that he was forthright, direct and responsive in answering the questions

posed. No motivation appears from the record that would justify an inference that he was lying. He left the stand with a strong impression on the part of this Court that he was a truthful witness, that he had socialized with Petitioner and some of his friends, but had not personally engaged in any sexual activity with Doe or any other man.

Elizabeth Cronin, now Director of Legal Affairs for our Court of Appeals, was previously employed as an Assistant District Attorney in the County of Westchester and was the intake official M. connection with the case against Doe. In February 1994, she was the person in charge of domestic child abuse cases for that office and, in the course of her duties, was assigned to interview "a twelve year old boy from the Bronx who had been an alleged victim of child sexual abuse by [Doe]." She testified that she had two separate interviews with the child, that Assistant District Attorney Bernhard, who was working on a separate aspect of the case, had set up the interview with the boy's mother and was present during part of the first interview. Ms. Cronin's handwritten notes are in evidence as Exhibit A. These were found as loose pages in the file and are said to cover interviews on March 18th of 1994 and on an earlier date. Ms. Cronin conceded that she was not sure if the notes were, in fact, "taken contemporaneous with his talking to me" or if they were in part contemporaneous and in part used in preparation for the interview (T. at 146). In the first interview, she did not inquire into sexual matters, but developed that Escalera knew Doe, had been in his apartment, could describe him physically and was knowledgeable about his car and the contents of the apartment, She testified that she developed from the second interview that Escalera had stated that Doe had touched him in the car on two occasions in his leg area or crotch and had invited him to a nude

beach, although Escalera said that he did not want to go. She quoted Escalera as stating that Doe had engaged in a forcible sex act with him in the apartment in July of 1993.

This case was but one of many sordid situations involving children dealt with by Ms. Cronin during her lengthy public service in the office of the District Attorney. Her recollection is based primarily on her notes, at least some of which are not contemporaneous records. Without making any adverse credibility finding (as requested by Petitioner) I conclude that where Escalera's testimony differs as to material facts, his version is entitled to greater weight.

In 1993, the Federal Bureau of Investigation (FBI) at Newark, New Jersey was conducting a child pornography investigation of Edgar Richard Bagarozy, Edward Federewicz, Doe, William P. O'Rourke and others. In the course of this investigation, more than 300 child pornography tapes and films were seized. The seizure included hand-written slips of paper showing films and tapes had been signed out to various individuals. One of the slips was designated for Doe and contained a telephone number for his Tarrytown, New York residence. Thereafter, a federal search warrant was issued for the Doe apartment and the search executed on September 9, 1993 simultaneously with the arrest of Bagarozy and Federowicz in Hudson County, New Jersey. The search turned up child pornography and confirmed contact between Doe and Bagarozy and some underaged children.

A contemporaneous memorandum (Ex. L) by the FBI shows that subject [Doe] was interviewed with legal representation on September 15, 1993 at the United States Attorney's Office for

the Southern District of New York in White Plains, New York following an interview conducted at the time of the search on September 9, 1993. Doe was granted a one day immunity agreement (Queen for a Day letter, Exhibit L). The contemporaneous FBI memorandum reports that:

> Subject [Doe] has offered to accept a federal plea to Receiving/Possession of Child Pornography from the storage locker in New Jersey if no state charges are not pursued (sic). Subject [Doe] is willing to testify against others, perform consensual and participate in any manner possible involving the on-going investigations or any which may develop subsequently.

The FBI Form 302 for the September 15th meeting is part of Respondent's Exhibit L and Murray Richman, Esq. who represented Doe at the proffer session testified at the hearing before this Court. At the proffer session, Doe admitted that he had engaged in creating child pornography, and had paid young boys to permit themselves to be photographed. He conceded that in 1975, in Maine, he had pleaded guilty to a sex offense with young boys, claiming however that he did not actually perform the acts charged. Doe, in the interview, conceded his own homosexuality and admitted he had socialized with others who enjoyed child pornography. He admitted to enjoying the company of young boys but denied any inappropriate behavior apart from fantasizing and his involvement in child pornography. During his "Queen for a Day" interview, Doe conceded that in 1989 and 1990, he had traveled to Baltimore, Maryland on three occasions to engage in sexual relationships with young boys and named the youths with whom he had participated. The report

quotes Doe as admitting he had sex with a juvenile named Edwin at Doe's residence in the last couple of months.

For reasons he explained, *infra*, Doe took a very strong position in favor of the prosecution of Bagarozy and Federowicz, and became an enthusiastic cooperator with the prosecution in New Jersey. He testified for the Government in the trial of Federowicz and Bagarozy in the United States District Court for the District of New Jersey, before the Hon. Dickinson R. Debevoise and a jury, commencing on February 17, 1995. He admitted that he had been a "Boy Lover" which he defined as a person who has sexual relations with boys under the age of consent. He conceded that he had committed sodomy in the second degree in this case and had pleaded guilty in Westchester County Court and was awaiting sentence. Further, that he had an agreement with the United States Attorney to bring his cooperation in New Jersey to the attention of the sentencing Judge.

Doe testified before this Court on March 17, 2003. He denied any physical or sexual contact of any kind and at anytime with Escalera. On September 9, 1993, Doe returned to his home in Tarrytown and found that a search warrant was being executed apparently in connection with the New Jersey investigation of Bagarozy and Federowicz who had been arrested that night in New Jersey. At the request of a New Jersey state trooper and, because he regarded himself as implicated the New Jersey child pornography case, Doe agreed to become a cooperating individual in the prosecution of Bagarozy and Federowicz. At Doe's federal proffer session in White Plains on September 15, 1993, there was no representative of the State of New York or the District Attorney of Westchester County

present (T. at 115). A second such meeting was held on October 4, 1993 in Newark. Mr. Storino, an investigator with the Westchester County District Attorney's Office, was present.

As Doe prepared to testify as a Government witness in the Newark prosecution of Bagarozy and Federowicz, he was advised by Attorney Richman in October, 1994 that the District Attorney's office in Westchester County had taken the position that, while appreciative of his federal cooperation, it could not ignore the local charge and that "I was going to have to come in and I was going to have to plead to a D felony of sodomy in the second degree,[4] and that I would be afforded a five year term of probation" (Tr. at 119). Based on his understanding that he would not be required to plead guilty in Westchester County if he testified in Newark, Petitioner discharged Attorney Richman and retained Arthur Del Negro Esq. of White Plains,

Attorney Del Negro negotiated for a plea bargain with the Westchester County District Attorney's Office to reduce the charges to a misdemeanor, but without success. Doe was scheduled for appearance pursuant to a witness subpoena in the Newark Federal trial. Mr. Del Negro became ill and asked Attorney Servino to take care of the matter during his unavailability.

Doe had the promise of the United States Attorney's Office in Newark that it would make note of his extensive cooperation in a letter to the sentencing judge, if he was required to take a guilty plea in the State prosecution. Doe informed Assistant United States Attorney Laura Kaplan in Newark that he was very

4. The use of force is not an element of this crime.

adverse to the idea of pleading guilty because, "not only hadn't I committed the underlying crime, but I have never in my life done anything like take somebody and throw them down on a bed or have any violent connection with them involving sex, ever" (Tr. at 124). AUSA Kaplan responded according to Petitioner: "You have a problem. You told them in the federal proffer that you had had some contact with the youth and you, in that case, will have to either go back [on] that or you will have to take the Fifth Amendment on the stand. If you take the Fifth Amendment on the witness stand during my trial, I will not be a happy camper." But see Ex. Q, the affidavit of AUSA Kaplan received in evidence pursuant to stipulation as a substitute for testimony:

> The purpose of the October 4, 1993 proffer session was primarily to ascertain what information [Doe] possessed about defendants Richard Bagarozy and Edward Eederowicz - the main targets of the investigation. At no time during the October 4, 1993 proffer session did the defendant discuss his relationship with Edwin Hernandez. Moreover, the defendant was intentionally never questioned about his relationship with Edwin Hernandez and Edwin Hernandez was not one of the children involved in the case being investigated as part of the Bagarozy/ Federowicz case.

The affidavit of FBI Special Agent Kyle (Exhibit R) is to the same effect.

Doe describes AUSA Kaplan's statement as having led him to believe that failing to plead guilty in Westchester would not be a wise course of action on his part. Doe testified that he had

been informed by Attorney Del Negro that the District Attorney's Office had taken the position that there was force involved in the case, that if he took [the offered] plea he would be afforded a non-custodial probationary sentence and that if he did not take the plea, he would be arrested and charged with a Class B felony (based on force) for which there is no probation authorized, and "therefore would end up doing substantial state prison time for this crime if I was convicted" (Tr. at 126). Doe also believed, erroneously, that the Assistant District Attorney had said that there was a written statement from the victim. There is no credible evidence that there ever was a written statement or that any person with knowledge in the District Attorney's Office made any such representation to Petitioner or any of his attorneys.

Doe claimed that he also wanted Bagarozy and Federowicz to be convicted in the Newark case and that he did not want to "upset or ruin their trial" (T. at 127). He claims that it was for these reasons that he entered the plea before County Judge Lange on February 6, 1995, the day before he was originally scheduled to testify in the federal case.

Petitioner's allocution before Judge Lange was explicit and complete and clearly admits a deviant sexual connection with an underage child. Petitioner testified that he was told by Attorney Servino, standing in for Del Negro, that he would be put under oath and that he would have to answer these questions in the affirmative or else his plea would not be accepted and he would then be facing a class B felony and lose his agreed, non-custodial sentence, and should he fail to plead, he could no longer be a cooperator in New Jersey.

*Appendix C*

Thereafter, Doe discharged Del Negro - Servino as his attorneys and returned to being represented by Murray Richman. A motion was made to withdraw the plea but solely on a technicality, and not on the basis of factual innocence. Prior to his sentencing in Westchester County, Doe testified in New Jersey and both Bagarozy and Federowicz were convicted. The United States Attorney made the promised representation to the state court and Doe was sentenced to a term of probation.

Doe's emphatic denial of guilt in connection with Escalera presents a difficult call for this Court against the background of Doe's sworn admission at the time of his plea, and at the federal trial in Newark. Courts should not ignore what the real world regularly acknowledges: people yield their honor and principles to overwhelming force and will say, even under oath, what satisfies their instinct for survival. That instinct supplies a very powerful motivation. Doe knew, and indeed was informed by his lawyer, that if he provided the testimony before Judge Lange to support his plea, he would be sentenced to a non-custodial sentence of mere probation, and would be able to testify against the Newark defendants, where his testimony would have to be consistent with his admissions supporting the plea.

He also knew that if he did not take the plea, or if his plea was rejected for failure to allocute, he could not testify in Newark and that he would be charged and tried in Westchester for the more serious charge of forcible sodomy, a Class B violent felony. He believed, not unreasonably, but through no fault of the prosecutor, that the District Attorney was in possession of a written statement from the proposed victim and that the victim intended to testify against him. He was told by his lawyers, and reasonably believed, that he would be convicted, and serve a

long custodial sentence, perhaps as long as twenty-five years. A properly prepared teenage victim of a sex crime can be a devastating witness, especially going one-on-one against a person with a prior sex conviction. It is well known that child molesters serve hard time. Faced with the alternatives known to him, and as might be expected, he decided to accept the highly favorable plea bargain and to say whatever he needed to say in order to do so. See testimony of Doe at pp. 125-126 which I find to be truthful.

In reality, Doe's was a plea coerced by circumstances, although there was no wrongdoing on the part of the District Attorney's Office or the trial judge. The law is clear that it is permissible to offer a lenient sentence in exchange for a plea, and that when such offer is refused a prosecutor can submit a more serious count or charge to the grand jury.[5]

Doe's contemporaneous conduct is consistent with his current claims. Confronted by the advice of Murray Richman, Esq. that he ought to accept the plea, and would be convicted if he went to trial, Doe changed lawyers. Since his conviction, Doe has steadfastly proclaimed his innocence, and that his only crime was being alone with a potential complainant who, for reasons unknown to Doe, had purportedly given a written statement evidencing Doe's guilt.

Petitioner testified before me. He is a college graduate, age 51 at the time of the hearing, with a degree in music and an employment history in many varied fields, including work for an accounting firm, a computer worker, a New York City taxicab

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5. Doe's plea was pursuant to a waiver of indictment.

driver and other tasks. Through it all he has served as a paid choir member in a church, and performed as a baritone soloist at Avery Fisher Hall, Carnegie Hall and elsewhere.

Doe conceded that he had first met Escalera in 1992, through another boy in the neighborhood who invited Escalera for an evening out, comprising of Doe and three boys. Similar outings followed (Tr. 94 *et seq*). While Doe admitted to being alone with Escalera in his apartment on one occasion for ten minutes, he denied any sexual contact. His testimony on this point has the ring of truth.

After the search of his apartment and the contemporaneous arrest of Bagarozy and Federowicz, Doe learned for the first time that they had been making pornographic films using several of the children known to him, although not Escalera. Doe, an admitted Boy Lover, thought this movie making was a betrayal of the children. For that reason, he became a willing cooperator in the Newark investigation and another in Baltimore.

Doe testified that immediately prior to taking his plea in Westchester, he told AUSA Laura Kaplan in Newark that he had not committed the underlying crime, and that he had never engaged in sex with anybody involving violence. Doe's explanation of his comment as quoted in the September 15, 1993 proffer session in Newark is somewhat strained. (Tr. at 281-84).

Nevertheless, on balance I am satisfied on the totality of the record before me that Petitioner has established his innocence by a preponderance of the credible evidence. He has also met the lesser standard mentioned in the mandate, of having presented

a credible claim of actual innocence. On the evidence presented, a reasonable juror would have to find a reasonable doubt as to Petitioner's guilt.[6]

II

The mandate also directs this Court to determine whether Petitioner exercised reasonable diligence in pursuing his actual innocence claim. Having concluded previously and now adhering to the conclusion that Petitioner failed to exercise reasonable diligence when he blew the applicable statute of limitations under AEDPA, it might seem inconsistent for this Court to find that Doe exercised reasonable diligence in pursuing his actual innocence claim.

The amount of diligence to be exercised reasonably depends on the significance or importance of the matter involved. Doe had maintained his claim all along, as our analysis in Part I demonstrates. From the date he took the plea until the date he got arrested for child pornography in the Eastern District, Petitioner, of course, exercised no diligence at all. He was obviously satisfied with his non-custodial sentence. As a result of a state appeal, he had eliminated the most onerous conditions of that sentence and was simply going about his life, putting his conviction behind him. When it came to his attention that the Westchester County conviction most likely would result in a significant increase in his Sentencing Guidelines in the Eastern

6. We should not overlook the rule announced by Learned Hand in *Dyer v. MacDougall*, 201 F. 2d 265, 268-69 (2d Cir. 1952). Cross-examination of a witness who denies a fact may not be relied on to prove the truth of what he denies. This point applies equally to Escalera's testimony and that of Doe.

District, both with respect to Offense Behavior and Criminal History Category, Doe began, for the first time, to ask about a way to assert his innocence, or vacate his conviction. Until April 2000 when he located Escalera for the first time since his conviction, and obtained his affidavit, Doe had nothing to go on except his own protestations. In his mistaken belief, the prosecutor had a written statement from Escalera inculpating him. On May 10, 2000, after the problem with Attorney W was solved, Doe's Section 440 motion was filed in state court. All agree the motion had to be filed to effect exhaustion of state remedies, before any federal writ could be sought. As this Court has previously noted, there is no statute of limitations in the State Court for a Section 440 Motion by a convicted person.[7]

Doe attempted to stave off his Eastern District sentence until his Section 440 Motion was heard and decided by the State Court. The Sentencing Court in the Eastern District rejected this attempt to gain delay and was affirmed on appeal. *United States v. Doe*, 239 F 3d 473 (2d Cir. 2001).

The issue before this Court prior to the remand was whether Petitioner was entitled to equitable tolling of the statute of limitations found in AEDPA. The standards for determining adequate diligence to achieve equitable tolling well may be different from the standards with respect to the issue which this Court is directed to determine on remand. The letter presents a close question. Once it became clear that he was going to be sentenced in the Eastern District, and that his Westchester

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7. Since AEDPA, it is customary practice to file a timely federal petition and seek a stay thereof while further exhaustion of state remedies is pursued.

conviction would enhance his Sentencing Guidelines, Petitioner did become diligent. He discharged Attorney W and hired another attorney who did proceed thereafter with reasonable diligence in processing the Section 440 Motion, to no avail, After the statute of limitations under AEDPA had expired, Doe did exercise reasonable diligence in pursuing his actual innocence claim. Between the date of his conviction and his arrest in the Eastern District, the matter was of little concern, and, in any event, there was nothing he could do about it without Escalera. I conclude that, based on the totality of the unusual circumstances in the case, Doe did exercise reasonable diligence in pursuing his actual innocence claim once he became able to pursue it at all.

**III**

At the hearing on remand, Petitioner attempted to revisit the issue of equitable tolling under AEDPA and attempted to distinguish the Court's prior findings of law office failure by labeling the law office failure in his case as representing an "abandonment" of the client by the attorney. This Court rejects the idea that there are material distinctions between the claimed abandonment, and law office failure, and egregious law office failure. As noted in our prior decision, our Court of Appeals has declined to find equitable tolling for a Petitioner who filed three days late due to law office failure, *Geraci v. Senkowski,* 211 F.3d 6 (2d Cir. 2000). The lateness in this case is about eleven months.

Petitioner also claims now that Attorney W declined to file the Section 440 motion until he could review the pre-sentence report in the Eastern District. It is possible that Attorney W thought that the Westchester conviction might not have a material

effect on Doe's Sentencing Guidelines as computed by the Eastern District Probation Office, making the Motion unnecessary, or as Petitioner now implies he might have been engaging in a fraud against the client or attempting to justify the procrastination so often associated with alcohol. The Court regards this argument as entitled to no weight and adheres to its prior findings on the issue of equitable tolling of AEDPA. In any event, this issue does not appear to be within the mandate.

## IV

This case, then, is one which *presents* clearly and directly the issue of whether actual innocence must, under the Constitution, be an implied exception to AEDPA's limitations, *Lucidore v. New York State Division of Parole*, 209 F.3d 107, 113-114 (2th Cir. 2000). This issue *has* been resolved adversely to Petitioner in *dicta* in the 5th Circuit in *Felda v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000).

The Constitutional provision relied upon reads as follows:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion, the public Safety may require it. Constitution Art I, § 9 cl, 2."

The Constitution did not define the scope of the Writ, and as *Fay v. Noia*, 372 U.S. 391 (1963) points out, it was not until the enactment of the Judiciary Act of 1867 that federal *habeas corpus* relief was extended to state prisoners, as a part of Reconstruction. The necessity to enact this statute suggests that the present power of a federal court to set aside state court

convictions pursuant to 28 U.S.C. Section 2254 is not founded on the *habeas corpus* provision in Article I of the Constitution, but rather arises from a later statute.[8] That Congress can limit or remove by statute that which it grants by statute should not require any lengthy exposition.

Furthermore, it flies in the face of common sense to suggest that placing a reasonable statute of limitations, with reasonable exceptions thereto, on the issuance of the Great Writ is equivalent to "suspension". Statutes of Limitation and Repose perform an essential function in an organized society. Beginning with *Fay v. Noia,* we have seen a serious abuse of the Great Writ in federal courts by state prisoners, including repetitious litigating of the same or new issues. This in turn has had a highly disruptive effect on the administration of justice and the prison systems of the states, and causes unnecessary burdens on our Federalism.

As this case shows, memory fades with time. Important witnesses die or become unavailable, so that if a conviction is set aside on a technicality, it is then often impossible for the state to retry the defendant. Congress made detailed findings of the abuses which had taken place and dealt reasonably with the perceived problems. It flies in the face of reason to suggest that AEDPA's limitation provision is unconstitutional on its face unless an implied exception can be found for actual innocence. Actual innocence is easy to claim and hard to refute, particularly when the issue is tendered long after the facts are cold. It is time that this unsound argument be reached and put to rest.

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8. The limitations issue may well be different as to federal prisoners, in light of the express reservation in 28 U.S.C. § 2255 which leaves open access to § 2241 in the district of imprisonment. There appears to be no statute of limitations as to § 2241.

## *Appendix C*

## *Conclusion*

The prior judgment of the District Court is reinstated. To the extent necessary, the Court also reissues the Certificate of Appealability previously issued to Petitioner and amplifies it to include all issues reached and considered on remand.

SO ORDERED.

Dated: White Plains, New York
June 23, 2003

s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 22, 2002

### UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### SUMMARY ORDER

At a stated Term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of October, two thousand and two.

Present: ELLSWORTH VAN GRAAFEILAND,
DENNIS JACOBS
ROSEMARY S. POOLER,
*Circuit Judges.*

(02-2149)

John DOE,

*Petitioner-Appellant,*

-v-

FREDERICK MENEFEE, Warden of the Otisville Federal Correctional Institution, and the NEW YORK STATE ATTORNEY GENERAL,

*Respondents-Appellees.*

*Appendix D*

Appeal from the United States District Court for the District of New York (Brieant, *J.*).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of said District Court is **VACATED** and this matter is **REMANDED** for further proceedings.

In 1995, John Doe [1] pleaded guilty to sodomy in the second degree, a charge based on his sexual abuse of twelve-year-old Edward Smith.[2] Doe specifically admitted mouth-to-penis contact with the minor. The Appellate Division, First Department, affirmed Doe's conviction on May 11, 1998, and denied him leave to appeal on August 19, 1998. Doe did not apply for certiorari to the United States Supreme Court. On May 10, 2000, Doe filed a petition pursuant to New York Criminal Procedure Law § 440.10 in the Westchester County Court. In his petition, Doe alleged, among other things, that he pleaded guilty because an assistant district attorney falsely claimed that Smith had inculpated Doe. To support this claim, Doe offered the affidavit of Edward Smith-Jones, who claimed that investigators from the district attorney's office questioned him in 1994 about his relationship with Doe. According to Smith-Jones, he denied the investigators' suggestion that Doe had forcible sexual contact with him. Smith-Jones further denied he ever had sexual contact with Doe, as a child or an adult. Although Smith-Jones' name is not identical to that of the victim, Petitioner also claims that he produced Smith-Jones' driver's license, which shows the same date of birth as the victim's.

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1. As allowed by the district court, Doe is a pseudonym.

2. Edward Smith is also a pseudonym.

*Appendix D*

On June 22, 2001, the state court denied Doe's motion. Doe filed a petition pursuant to 28 U.S.C. § 2254 on November 30, 2001.

The district court dismissed Doe's petition as untimely pursuant to 28 U.S.C § 2244(d). Doe contended that his petition should be equitably tolled because (1) he had retained an attorney to exhaust his state court remedies long before the deadline for filing a Section 2254 motion; (2) he and his brother continually asked the attorney to file the Section 440.10 motion in a timely fashion and the attorney assured them that the motion would be filed on time; and (3) he has offered credible proof of actual innocence. The court found that Doe alleged simple law office failure, which does not merit equitable tolling, and that actual innocence by itself does not justify equitable tolling.

On appeal Doe argues that (1) rather than claiming law office failure, he claimed active attorney deception and abandonment, which does merit equitable tolling; (2) he could not have filed the Section 440.10 motion himself in the face of his attorney's failures because the federal facility in which he was confined had no state law materials; and (3) a credible showing of actual innocence should equitably toll the statute of limitations.

We have not yet determined whether "the Constitution requires an 'actual innocence' exception to [the Anti-Terrorist and Effective Death Penalty Act's] statute of limitations." *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 114 (2d Cir.), *cert. denied*, 531 U.S. 873, 121 S.Ct. 175, 148 L.Ed.2d 120 (2000). We have, however, held that in order to show actual innocence "a petitioner must present 'new reliable evidence that was not presented at trial' and 'show that it is

more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 299, 327-28, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)). In this case, Doe has presented evidence, the affidavit of his alleged victim, which might weil lead a reasonable juror to find him not guilty. However, the respondent also has presented extensive evidence undermining the victim's affidavit. In addition to Doe's detailed guilty plea, this evidence includes contemporaneous notes by the assistant district attorney who interviewed Smith-Jones. Moreover, Smith-Jones' claims have not been tested by cross-examination.

We appreciate that the district court is of the view that there is no actual innocence exception, but we decline to review that ruling at this time. In a proper case, we will decide whether constitutional considerations require an actual innocence exception to AEDPA's statute of limitations, but we do not know on the basis of the record in hand whether this case compels us to do so. *See Wyzykowski v. Dep't of Corrs.*, 226 F.3d 1213, 1218 (11th Cir.2000) ("the factual issue of whether the petitioner can make a showing of actual innocence should be first addressed, before addressing the constitutional issue of whether the Suspension Clause requires such an exception for actual innocence"). Therefore, we vacate the district court's judgment and remand for the district court to decide as a mater of fact whether Doe has presented a credible claim of actual innocence.

In the course of addressing questions that bear upon Doe's claim of actual innocence, the district court is directed to consider whether a petitioner asserting actual innocence must demonstrate that he was reasonably diligent in pursuing that claim. The district court found that Doe failed to exercise reasonable diligence by

relying on his negligent attorney to bring his Section 440.10 motion. The court should now determine whether Doe exercised reasonable diligence in pursuing his actual innocence claim.

Because of the disposition we reach, we do not consider Doe's argument that his attorney's failure rose to the level of extraordinary circumstances required for equitable tolling. We also do not consider Doe's remaining argument concerning the adequacy of the prison library.

FOR THE COURT
ROSEANN B. MAKECHNIE, Clerk

By: _____

## APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 16, 2001

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

01 Civ. 10782 (CLB)

JOHN DOE,

- against -

FREDERICK MENEFEE, Warden, et al.,

Respondent.

***Memorandum & Order***

*Brieant, J.*

By his counseled Petition filed under seal in this Court on November 30, 2001, Mr. John Doe,[1] now a federal prisoner, seeks pursuant to 28 U.S.C. § 2254, to vacate a judgment of conviction of the Westchester County Court, based on his plea of guilty to a state felony, entered January 16, 1996. A non-custodial sentence of probation was imposed on January 16,

1. Petitioner's counsel received leave to file under seal, by order of the Part I Judge dated November 30, 2001. That order was modified on December 28, 2001, to permit Petitioner to continue to litigate under the pseudonym of John Doe, and to redact his true name from any documents attached to pleadings, but all papers filed after that date are to be public.

1996, which would have expired in January 2001, according to its terms. However, in November, 2000, Westchester County filed a Detainer and Probation Violation Warrant with the Federal Bureau of Prisons in connection with a charge of violation of probation. Since the Detainer remains outstanding, Petitioner is in state custody now and as of November 30, 2001, when this Petition was filed. *Braden v. 30th Judicial Circuit,* 410 U.S. 484 (1973).

Petitioner appealed a condition of his probationary sentence and also claimed on his appeal that there was a jurisdictional defect. The Appellate Division of the New York Supreme Court affirmed the conviction, but modified the conditions. A hearing on remand in the County Court of Westchester County on December 22, 1997 resulted in a re-sentencing. The Judgment was modified and affirmed on May 11, 1998 by the Appellate Division, which on August 19, 1998 denied leave to appeal. This was the last event in the state prosecution. Accordingly, the Statute of Limitations under AEDPA, as construed by our Court of Appeals in *Williams v. Artuz,* 208 F.3d 13 (2d Cir. 2000) to include ninety days additional for a Petition of Certiorari to the Supreme Court, not taken, expired at least, on November 19, 1999, no other state proceedings having taken place[2].

Petitioner on April 9, 1999, pleaded guilty to a federal felony in the Eastern District of New York. As could have been anticipated, this Westchester County conviction was utilized to his detriment under the United States Sentencing Guidelines.

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2. The District Attorney claims that the statute of limitations expired August 19, 1999. *See* Supplemental Memo. Of Law at 2. This Court is inclined to agree, but need not reach the issue since the statute clearly had run when this case was filed.

He sought from the district court a stay of sentencing to permit him to file a motion in the state court pursuant to § 440.10, N.Y.Crim.P.Law to vacate this prior state conviction, which stay of sentencing was denied. Such denial was affirmed. *United States v. Doe*, 239 F.3d 473 (2d Cir. 2001). Our Court of Appeals held that "[defendants who successfully attack state convictions may seek review of federal sentences that were enhanced on account of such state convictions." *Id.* at 475.

Petitioner's state court motion under § 440.10 New York Crim. P. Law, as to which there are apparently no time limitations, was filed May 10, 2000. It contains allegations which if true, are troubling. After having scheduled an evidentiary hearing, the County Court on June 22, 2001, reversed itself and concluded that no hearing should be held because the claims were either barred by New York law or based on mere speculation.[3] Briefly stated, the Petitioner claimed, by an attorney's affidavit, that based on information not in the court record, the conviction should be vacated because of actual innocence and because exculpatory material, consisting of a statement by the alleged victim had been withheld or materially misrepresented; because the plea was procured by duress "arising from coercive tactics of the Westchester County District Attorney's Office with the aid of the United States Attorney's Office for the District of New Jersey;" and becaus . an Assistant District Attorney in Westchester had agreed that Petitioner would not be prosecuted in exchange for his continued cooperation with the federal authorities in New Jersey in an unrelated criminal matter.

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3. Petitioner notes that this reversal on reargument followed adverse publicity generated by an unknown source after the initial decision to hold a hearing was filed. The State Appellate Division denied leave to appeal this judicial flipflop.

*Appendix E*

Absent the evidentiary hearing ordered and then denied, this Court must assume the validity of these disturbing factual assertions, which are developed in far greater detail in the papers submitted.

The relief sought is not barred by the combined effect of *Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001), and *Daniels v. United States*, 532 U.S. 374 (2001), each decided April 25, 2001. *See also Custis v. United States*, 511 U.S. 485 (1994). This is so because Petitioner is "in custody" under the state conviction, by reason of the Detainer filed by Westchester County with the Federal Bureau of Prisons. However, the Petition is time barred under the AEDPA statute of limitations, which, as noted above, expired, prior to the filing of the § 440.10 motion on May 10, 2000.

Petitioner first seeks "equitable tolling" of the statute of limitations under AEDPA by reason of law office failure. The facts presented, which are claimed to constitute law office failure are set forth in some detail in Petitioner's submissions to the Court. Unsaid is the fact that Mr. Doe is an educated person of adequate financial means, with family and friends on the outside who can respond to his requests and needs. His brother held his power of attorney at all relevant times to manage his affairs. Originally, Mr. Doe asked his attorney Murray Richman to act for him in connection with the § 440.10 motion. Mr. Richman properly advised that "since he would be a likely witness to some of the issues," namely the agreement for immunity, it would be best for Petitioner to retain new counsel. Petitioner describes this conversation with Mr. Richman as occurring at an undisclosed date after his federal arrest and after he became aware that his prior state conviction would affect his federal Sentencing

Guidelines. (Doe affirmation dated December 29, 2001, p.1, attached as Ex. D to Pollok Declaration filed January 28, 2002.)

Petitioner selected one W., formerly a successful and respected criminal practitioner whom he had known personally, to represent him in connection with his § 440.10 motion. W. had fallen on hard times and was so adversely affected by illness and alcoholism that in the Spring of 1999 he was practicing out of shared space in a law firm in Manhattan, with no associates or staff. Petitioner arranged through his brother, who held his power of attorney, to hire attorney W. and the brother did so by making a substantial payment on March 2, 1999 to the wife of the attorney. Through his brother and attorney-in-fact, Petitioner also retained directly a Private Investigator to locate the alleged victim of the crime for the purpose of obtaining an affidavit for W. to use in support of a claim of factual innocence.

Petitioner admits (brief at 9) that he was "concerned about the time limitations imposed in federal habeas cases and feared he would lose the federal remedy "if the § 440 motion were not timely filed." Petitioner's submissions disclose in detail what we now summarize.[4] He paid an additional fee to the wife of attorney W. on December 17, 1999 based on assurances that this derelict lawyer would file the § 440 motion promptly, but by that time the AEDPA statute of limitations had already run.

Although the claimed problem with the lawyer was or should have been known to Petitioner and his brother as early as April

4. The District Attorney attacks the contentions as based in part on "rank hearsay" but this Court assumes that were an evidentiary hearing to be held, the contentions could be proved by competent evidence.

1999, they failed to respond to the obvious. Ultimately, attorney W. admitted his "negligence," refunded part of the fees his wife had received from Petitioner, and in early February 2000, Petitioner hired his present lawyers, who filed the § 440 motion on May 10, 2000. By that lime the AEDPA statute of limitations had long since run.

The conduct of attorney W. hardly covers the profession with glory. Clearly Petitioner and his attorney-in-fact brother both knew or should have known that they were up against a time problem and that the attorney, not assigned by the Court, but chosen by Petitioner, was derelict and would not, or could not, perform. A federal Petition under 28 U.S.C. § 2254 could have been filed in the most simple form, and stayed pending exhaustion of state remedies; a simple § 440 motion could have been filed and amended later. The facts submitted, viewed most favorably to Petitioner, do not suggest a finding of impossibility, or prevention by official misconduct which is at the core of most equitable tolling cases.

Prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act, effective April 4, 1996, there was no time !imitation for bringing a collateral attack in federal court on a state conviction, so long as the Petitioner was in custody" under the judgment sought to be vacated. Perceiving widespread abuse and delay of finality, and concerned also that such proceedings place great strain on our federalism, Congress sought to curtail collateral attacks on state convictions and reduce the delay. Specifically, Congress enacted § 2254(d)(1) to include a one-year statute of limitations which begins to run from the latest of:

(A) the date on which the judgment became final on the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Apart from the express toiling period in (d)(2) for the time in which state post-conviction or other collateral review is pending, the statute does not include any avenue for e' .tending the one-year period due to equitable considerations. *See in re Wattanasiri*, 982 F.Supp. 955, 957 (SDNY 1997) ("Neither the statute nor the pertinent rules of court authorize a district court to extend the time within which a petition must be filed in order to avoid the bar of the statute of limitations enacted by Congress.)

The Fourth Circuit, in *United States v. Prescott*, 221 F.3d 686 (4th Cir. 2000), recognizing the potential of such contentions

to undermine legislative intent, held that absent counter indications, courts should not assume that "Congress . . . intended] courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Id.*, 221 F.3d at 689. For that proposition, it relied on (and quoted from) the Supreme Court's decision in *United States v. Brockamp*, 519 U.S. 347, 352 (1997). In *Brockamp*, the Court rejected a claim that equitable tolling principles could be used by taxpayers who sought, years later, to recoup overpayments to the IRS to circumvent the statute of limitations enacted by Congress to control such actions. Writing for the unanimous Court, Justice Breyer held that a judge, presented with such an issue, may appropriately ask: "Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350 (citations omitted). In *Brockamp*, the Court determined that Congress would not have wanted the doctrine to apply, because it had put the time limitations at issue "in unusually emphatic form," had used language that was "not simple," and had "set forth . . . limitations in a highly detailed, technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions. *Id.* Of particular *relevance to* AEDPA, the Court noted in *Brockamp* that Congress had plainly labored over various scenarios and made provision to permit an action upon the happening of the "later" event, and had "iterated] . . . the limitations in both procedural and substantive forms, . . . [with an] explicit listing of exceptions." *Id.* At 351. AEDPA was enacted primarily to put an end to the unacceptable delay in the review of prisoners' habeas petitions. Resort to equitable principles so that the statute might be rewritten in favor of a tardy would-be petitioner would seem to undo the very priority that impelled Congress to act.

However, in contrast to the Fourth Circuit our Court of Appeals in *Smith v. McGinnis*, 208 F.3d, 13, 17 (2d Cir. 2000) on which Petitioner relies, adopted the theory of equitable tolling. The Court in *Smith*, however, declined to find equitable tolling where Petitioner, who was appearing *pro se* filed in federal court only 87 days after the state denied collateral relief. There was only one day left to run on the statute when the state proceeding, which tolled the federal statute, was filed. See also *Warren v. Garvin*, 219 F.3d 111 (2d Cir. 2000) (suggesting equitable tolling has Constitutional underpinnings in the Suspension Clause, but denying relief because petitioner failed to exhibit reasonable diligence); *Geraci v. Senkowski*, 211 F.3d 6 (2d Cir. 2000) (Petitioner filed three days late. Court found "there is no indication that [Petitioner's] counsel was concerned about dates and limitations until it was too late to matter.) *But see Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (court notes that no prior case in this circuit has actually applied equitable tolling, but holds the statute was tolled because a state corrections officer "intentionally" confiscated a prisoner's habeas corpus petition and related legal papers. The Court in *Valverde* did not reach the question of the direct applicability of § 2254(d)(1)(8), which would seem to apply, because it was not within the scope of the Certificate of Appealability granted in the case. Closest to Doe's case is the recent decision of our Court of Appeals in *Smaldone v. Senkowski*, 273 F.3d 133, 137 (2d Cir. 2001) in which the Court held that "This Circuit . . . has found attorney error inadequate to create the 'extraordinary' circumstance equitable tolling requires." and also that:

> To merit application of equitable tolling, the petitioner must demonstrate that he acted with "reasonable diligence" during the period he wishes to have tolled,

> but that despite his efforts, extraordinary circumstances "beyond his control" prevented successful filing during that time. *See Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Sandvik v. United States*, 177 F.3d 1369, 1271 (11th Cir. 1999).

*See also Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001) cited with approval in *Smaldone* (attorney error, miscalculation, inadequate research or other mistakes - insufficient for equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (lawyer's mistake not a valid basis for equitable tolling); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999) (attorney negligence not a basis for equitable tolling).

Wholly apart from the issue of attorney neglect as a basis for equitable tolling, Petitioner seems to argue that his claim of actual innocence bears on the issue of equitable tolling (Brief at 191) and "in and of itself, should be sufficient grounds" to toll the limitations period. The case of *Celaj v. Artuz*, 2001 WL 736782 (SDNY June 28, 2001), is cited for this unusual proposition. *Celaj* did not find equitable tolling and Petitioner in that case did not argue that he was factually innocent. The Court suggested in *dicta* that there is a "miscarriage of justice" exception to the statute of limitations. This Court has strong reservations as to whether there is such an exception in light of the clear intent of AEDPA to bring repose to state convictions in the federal courts, whatever the social cost. However, the argument is by no means frivolous. In *Lucidore v. New York State Divison of Parole*, 209 F.3d 107, 113-114 (2d Civ. 2000) our Court of Appeals declined to reach the issue of whether "in order to survive various Constitutional challenges, AEDPA's

limitations period must be read to include, by implication, an exception for cases in which a petitioner is actually innocent" because *Lucidore* had failed to demonstrate actual innocence, in that it was "more likely than unlikely that no reasonable juror would have found him guilty beyond a reasonable doubt". The Court in *Lucidore* declined to "reach the question of whether the Suspension Clause of the Constitution requires that we read an "actual innocence" exception into AEDPA's Statute of Limitations. This issue of law, which may rise to the level of a Constitutional right, appears to remain open in this Circuit. *See Smith v. Artuz*, 2002 WL 48538 (SDNY January 14, 2002) (Mukasey, Ch. J.) and *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997) *(Dicta*, in the context of a motion under 28 USC § 2255)[5]

There is a philosophical difficulty in finding that a clearly guilty person whose basic Constitutional right has been violated (for example the right to an unbiased jury, held non-waivable in *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002)) has less right to the writ than one claiming actual innocence. Traditionally, the Great Writ was used to grant relief from illegal detention and enforce due process and the right to bail, rather than to adjudicate actual innocence where the proceedings leading to a conviction were otherwise regular. *See generally Fahy v. Noia*, 372 U.S. 391, 403-405. (1963) and cases cited, overruled by *Coleman v. Thompson*, 501 U.S. 722 (1977).

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5. In *dicta*, in *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000), a panel of the Fifth Circuit held that an "actual innocence claim does not constitute a 'rare and exceptional' circumstance, given that many prisoners maintain they are innocent", and therefore, is not a basis for equitable tolling.

*Appendix E*

This Court's consideration of the plain meeting and the history of the Suspension Clause, Const. Art 1, Sec. 9 Cl.2, does not suggest that Congress is without power to establish a statute of limitations with the facially reasonable express exceptions as found in AEDPA, and no other implied exceptions. However, the broad gratuitous hints being furnished by judges in this and other circuits to the contrary suggest we may turn out to be wrong.

Because the Court finds that the Petition is time barred and that the totality of the facts presented do not, as a matter of law, rise to the level required for equitable tolling, the Petition is dismissed.

Because significant legal issues are presented, including a claim of factual innocence, Petitioner is entitled to a Certificate of Appealability. The issue certified for appeal is whether the case is time barred. If Petitioner wishes to recast or rephrase the issue certified so as to focus on the claim of actual innocence, such a request may be made on notice to the District Attorney.

The Clerk shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York
February 21, 2002

s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

## APPENDIX F — SUPPLEMENTAL MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 16, 2001

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

01CIV10782 (CLB)

JOHN DOE,

Petitioner,

-against-

FREDERICK MENEFEE, Warden, et al.,

Respondent.

***Supplemental Memorandum & Order***

*Brieant, J.*

In this Court's memorandum and Order dated February 21, 2002, the Court dismissed this Petition by a state prisoner, under 28 U.S.C. § 2254 as time barred but issued a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c). The issue certified was "whether the case is time barred". Perceiving that Petitioner might wish to "recast or rephrase the issue certified so as to focus on the claim of actual innocence", this Court invited a request on notice to the District Attorney.

*Appendix F*

Such a request was made by letter under date of February 25, 2002, that the "statute of limitations issue certified for appeal be "expanded to include [Petitioner's] claim of actual innocence as a basis to permit equitable tolling". This request is granted. Indeed, it would appear that a proper certification should in the context of this case include all relevant facts or contentions which bear upon the correctness of the judgment to be appealed from. Accordingly this Court may be deemed to have issued the broadest certificate permitted by law.

Petitioner takes advantage of this Court's invitation to comment on the scope and form of the Certificate of Appealability, to ask this Court to "grant a limited fact finding hearing on the issue of "deception" by attorney W. in connection with his activities or lack thereof as detailed in the decision and also to try the issue of actual innocence, without a jury. This the Court declines to do. There is no basis to hold an evidentiary hearing and make findings in a case that is time barred (in this Court's view) and to do so represents an inappropriate burden on our federalism. Instead, we have treated the non-frivolous allegations of fact made by the Petitioner, as to which the state court declined to hold a hearing, as all true.

This Court treated the saga of Attorney W, as regrettably true - no principled basis is found in our jurisprudence to treat the negligence of a privately retained attorney, barred as a basis for equitable tolling by *Smaldone* and other cases cited in the prior opinion, as different from "fraud" as now suggested for the first time, in the February 25th letter.

In any event, the facts do not support an inference of fraud, which would require proof of *scienter* on the part of attorney

W, when he promised to bring the § 440 motion, and *reliance* on the part of Petitioner and his brother, which became unreasonable as a matter of law long before the statute of limitations ran out.

The second paragraph of the letter is treated as a motion, and in all respect denied.

SO ORDERED

s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

Dated: White Plains, NY.
March 1, 2002

## APPENDIX G — DECISION AND ORDER OF THE COUNTY COURT OF THE STATE OF NEW YORK, COUNTY OF WESTCHESTER FILED AND ENTERED FEBRUARY 16, 2001

**COUNTY COURT OF THE STATE OF NEW YORK**
**COUNTY OF WESTCHESTER**

S.C.I. #95-0180

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOHN DOE,

Defendant.

**DECISION & ORDER**

LANGE, J.

This is a motion pursuant to Section 440.10 of the Criminal Procedure Law to set aside defendant's conviction. On February 6, 1995, the defendant pleaded guilty on one count of sodomy in the second degree pursuant to Superior Court Information #95-0180. Prior to sentencing, the defendant filed a presentence motion to withdraw his guilty plea, arguing that Superior Court information plea procedures were jurisdictionally defective. This motion was denied.

On January 16, 1996, the defendant was sentenced to a term of probation for five years with special conditions and a judgment of conviction was entered against the defendant.

*Appendix G*

The defendant appealed his conviction citing the denial of his motion to vacate his plea, as well as challenging the conditions of probation. On September 15, 1997, the Appellate Division, Second Department affirmed his conviction (*People v. John Doe,* 242 AD2d 583), however, the Appellate Division remanded the matter to the trial court to make a determination concerning some of the conditions of probation.

The charge against the defendant arose out of an investigation conducted in 1993 by Federal agents who identified male pedophiles who disseminated child pornography involving young boys over State lines, and transported minors over State lines for the purpose of sexual exploitation. Certain local agencies, including the office of the District Attorney of Westchester County cooperated with the Federal authorities and participated in this investigation.

During the course of this investigation, the office of the District Attorney of Westchester County obtained an order authorizing wire surveillance of the defendant's telephone in Tarrytown, New York, as well as that of another suspected individual in Mount Vernon. As a result of that wire surveillance, the Westchester County District Attorney's office became aware of activity which became the subject of the Superior Court information to which the defendant pleaded guilty.

On October 4, 1993, the defendant participated in a "proffer session" between Assistant United States Attorney for the District of New Jersey, Laura Kaplan, and the defendant, represented by counsel. Police and investigative agents from other State and Federal agencies, including an investigator from the Westchester County District Attorney's Office, also attended this session.

*Appendix G*

A written agreement was entered into setting forth the use for which the information divulged by the defendant could be used against him. This agreement was signed by the defendant, his attorney, the Assistant United State Attorney, as well as representatives of the New Jersey State Police, the F.B.I. and the Westchester County District Attorney's Office. A paragraph was deleted from the agreement and initialed by all the signators to the agreement which read, "Fourth, it is understood by your client that the government makes no implied or express promises with respect to any investigations or prosecutions initiated by any state or local law enforcement agency or prosecutor's office." Subsequent to this proffer session, the Westchester County District Attorney's office continued its investigation into the defendant's activities in an attempt to locate the young man with whom the defendant is alleged to have engaged in sexual activity.

In October 1994, former Assistant District Attorney Elizabeth Cronin telephoned the defendant's attorney to advise him that charges would be filed against the defendant in Westchester County and requesting his assistance in arranging for the defendant's surrender. Negotiations were conducted and the People offered the defendant a plea to sodomy in the second degree with the People taking no sentencing position and offering no opposition to a sentence of probation.

On November 9, 1994, Ms. Cronin was contacted by Arthur DelNegro, Esq. who indicated that the defendant was dissatisfied with his prior attorney's representation and the defendant believed that a promise had been made that he would not be prosecuted for any crime in Westchester County in exchange for his cooperation with the Federal investigation. Mr. DelNegro was

advised that that was not the case and that the sodomy charge would be pursued subject to the plea offer.

On November 21, 1994, Ms. Cronin met with Mr. DelNegro who had been retained by the defendant. At that point, the defendant contended that he had been promised immunity from prosecution by another Assistant District Attorney in return for his cooperation with the Assistant United States Attorney. Ms. Cronin denied that any such promise had been made.

Discussions between the Westchester County District Attorney's office and the defendant's attorney continued over the following two months. At the end of January 1995, the defendant, through his attorney, indicated his willingness to accept the plea agreement. On February 6, 1995, the defendant entered a guilty plea to the Superior Court information.

The defendant now seeks to set aside his conviction based on four claims. He claims that the People knowingly withheld exculpatory material. The defendant has submitted an affidavit from Edwin Hernandez Escalera, the individual with whom the defendant was convicted of having sexual relations. In his affidavit, Mr. Escalera states that "at no time did [he] have sexual contact of any kind with John Doe either as a minor or as an adult." Mr. Escalera also states that he informed investigators of the Westchester County District Attorney's office that he had never engaged in sexual contact with the defendant. The defendant claims that the People were in possession of such a statement from Mr. Escalera to the effect that the defendant had never engaged in sexual contact with him and that this statement was withheld from the defense.

*Appendix G*

The defendant claims that the Westchester County District Attorney's office reneged on its promise not to prosecute the defendant in return for his cooperation with the Assistant United States Attorney.

The defendant's third argument was that the plea was obtained as a result of undue duress from the Westchester County District Attorney and the Assistant United States Attorney. He also claims that the plea was the result of ineffective assistance of counsel the defendant received from his attorneys at the time he was advised of the guilty plea in that his attorneys overlooked a signed cooperation agreement in which the District Attorney agreed not to prosecute the defendant.

The defendant's papers raise sufficient questions and this Court directs the matter be set down for an evidentiary hearing to determine the extent of any agreement between the defendant and the People concerning the benefit to be extended to the defendant in return for his cooperation with the Federal prosecutor, the extent of any pressure put on the defendant by prosecutors to enter a guilty plea and the existence and/or improper withholding of exculpatory evidence by the People.

The Court directs that the attorneys for the parties attend a conference on Friday, March 2, 2001, at 2:00 P.M.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
February 16, 2001

s/ Kenneth H. Lange
KENNETH H. LANGE
County Court Judge

## APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 9, 2005

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**THURGOOD MARSHALL U.S. COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of June two thousand five.

Docket No. 03-2432-pr

JOHN DOE,

Plaintiff-Appellant,

v.

FREDERICK MENEFEE, Warden of the Otisville Federal Correctional Institution; THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants-Appellees.

*Appendix H*

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant John Doe. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to an other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/ [illegible]
Motion Staff Attorney

3/14/2001 8:15 AM FROM: Fax The Intervals Group, LLC TO: 1-212-679-1844 PAGE: 002 OF 003



# APPENDIX I — ARTICLE

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# Pedophile gets immunity hearing

## Man claims he made deal with feds to testify against NAMBLA leader

Bruce Golding
The Journal News

WHITE PLAINS – A judge has ordered a hearing into allegations that Westchester prosecutors reneged on a promise of immunity for a pedophile who testified against a high-ranking member of the North American Man/Boy Love Association.

[redacted], an amateur opera singer, was sentenced to probation in 1996 after he pleaded guilty to sodomizing a 12-year-old boy inside his former Tarrytown home.

But [redacted], who is now serving a five-year prison term in an unrelated federal child-pornography case, now contends the sodomy conviction should be thrown out because of his deal to testify against the NAMBLA member.

[redacted] lawyer, Michael Poli-

**IN COURT TODAY**

**White Plains man** faces sodomy charges in case involving 11-year-old boy, **1B**

lak of New York City, could not be reached for comment, but a spokesman for Westchester District Attorney Jeanine Pirro described [redacted] claims as baseless and said [redacted] was only making them up so he could try to reduce his sentence in the child-pornography case.

"This is a recidivist, no two ways around it, and he's trying to manipulate the system," said Executive Assistant District Attorney David Hebert.

In 1995, [redacted] was a key witness against former Mount Vernon resident Richard Beganosy, who was convicted of bringing three boys from New York to

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Feb 27, 2001

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*Appendix I*

point when the Fed meets again, March 20. Some say Greenspan may act as soon as this week after a survey on consumer confidence is released today.

# Judge grants immunity hearing for pedophile

IMMUNITY, from 1A

New Jersey, where they were videotaped performing sex acts.

At the time, authorities said Bagarozy was a ranking member of NAMBLA, which advocates what it calls consensual sex between adult men and underage boys, and that other association members raised money to pay for his defense.

As part of his claim to vacate his subsequent sodomy conviction, [redacted] filed a copy of his federal cooperation agreement in the Bagarozy case. In the agreement, a paragraph indicating that he could face prosecution by local authorities was crossed out.

[redacted] also submitted an affidavit from his now-grown victim in the sodomy case, whom [redacted] met at a Bronx video arcade. In the affidavit, the victim said he never had sex with [redacted] and told that to investigators before [redacted] pleaded guilty.

Earlier this month, Westchester Judge Kenneth H. Lange ruled that [redacted] had raised "sufficient questions" to warrant a hearing. Lange scheduled a conference in the case for Friday.

The federal prosecutor in the Bagarozy case, Laura Kaplan, said her deal with [redacted] did not include immunity from prosecution in Westchester, but she declined to comment further, citing the likelihood she would have to testify before Lange.

[redacted]

Reg. 7.

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